TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 144.

WASHINGTON, ALEXANDRIA AND [illegible] RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

EDWARD A. DOWER.

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IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED APRIL 14, 1904.

(23,031)

(23,631)

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1 In the Court of Appeals of the District of Columbia.

No. 2467.

WASHINGTON, ALEXANDRIA AND MT. VERNON RAILWAY CO., &C.,
Appellant,
vs.
EDWARD A. DOWNEY.

Supreme Court of the District of Columbia.

At Law. No. 51165.

EDWARD A. DOWNEY, Plaintiff,
vs.
WASHINGTON, ALEXANDRIA AND MT. VERNON RAILWAY COMPANY,
a Corporation, Defendant.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

Declaration, etc.

Filed November 28, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 51165.

EDWARD A. DOWNEY, Plaintiff,
vs.
WASHINGTON, ALEXANDRIA AND MT. VERNON RAILWAY COMPANY,
a Corporation, Defendant.

The plaintiff, Edward A. Downey, sues the defendant, the Washington, Alexandria and Mt. Vernon Railway Company, a corporation duly incorporated, chartered and organized under and by virtue of the laws of the state of Virginia and having an office, agents and officers and doing business in the District of Columbia for
2 that heretofore, to wit, on the 29th day of November, A. D. 1907, and for a long time prior thereto, the said defendant company had been and was such corporation and had been and was operating its cars over certain railway tracks in the District of Co-

lumbia, laid along and upon divers streets in the City of Washington, D. C., from its station situated at the Southwest corner of Pennsylvania Avenue and Twelfth Street, Northwest, to the intersection of B Street and Fourteenth Street, Southwest, from which point the said defendant owned, possessed, operated and controlled a double line of railroad tracks extending upon the said Fourteenth Street to the Potomac River and from thence to and across the highway bridge spanning the said river in said District, said tracks continuing through the County and City of Alexandria, Virginia, and the County of Fairfax to Mt. Vernon in said last named County and State; that the said defendant had been and was on the day and year aforesaid a common carrier of passengers and freight for hire and was and had been engaged in trade or commerce in the said District of Columbia, and also between the said District and the State of Virginia by means of cars and trains of cars drawn and propelled over and upon the said railway tracks by motor cars supplied by electrical power and equipped with electrical machinery; that beginning at the north end of said highway bridge and extending over and upon the same, the said power was communicated to the motor cars by wire strung over the centre of said railway track in co-operation with a metal pole and spring attached thereto, one end of which pole was fastened to the top of the car; that the said pole extended over the top of the car aforesaid over and above the said car to a point above and over the rear platform of said car, at which end of said metal pole there was affixed an iron, steel or copper trolley wheel, with a grooved perimeter, which, by the force of the said spring was held in position against and underneath the said wire and received and communicated the said power to the motor car aforesaid; that at said pole's end to which was affixed the trolley wheel aforesaid, there was attached a rope reaching down to the said rear platform which rope was used by the trolleyman or brakeman of the defendant to control and adjust the said trolley wheel to the overhead wire aforesaid when the said cars were to be drawn, driven or propelled on or over said railway, and to release said pole and trolley wheel from said overhead wire when the current should be shut off, as occasion required, in the operation and movement of said cars or trains under the signals or orders of the motorman or conductor; that the said over head trolley wire conveying said power was strung over the said track and upon and across the said Potomac Highway Bridge, which was and is constructed with a draw, at either end of which the rails of the said track and the said overhead trolley wire were and are disunited and disconnected to permit the said draw to be swung or opened for the passage through the same of vessels navigating the said river; that the said defendant company had issued and given orders and commands to its motormen and conductors requiring them to bring defendant's cars or trains to a stop at either end of the said draw before attempting to run them across the same, and also had
3 stop signs and signals erected at either end of the said draw, and it became and was the duty of the engineer or motorman controlling the movement of cars or trains, in obedience to said or-

ders and signals, to stop the cars as aforesaid, and then to proceed with the said cars slowly and with caution upon the said draw at said point of disconnection so that the trolleyman or brakeman, by means of the said rope, could, before reaching said point or place in said wire, pull down the said trolley wheel off and from the said wire until the said point or place was passed to prevent the said wheel from becoming violently displaced from the said wire by reason of said disconnection and flying off and upwards by force of the said spring and damaging the same and the said bridge and cars; and the stopping of said cars on said bridge was notice to the trolleyman that the said point of disconnection in said wire was about to be reached and to be in readiness for the performance of his duties in respect thereto as aforesaid.

And the plaintiff says that on the said 29th day of November, A. D. 1907, he was an employee of the said defendant company, employed in the service and capacity of trolleyman on its cars or trains running over its said tracks in the said District of Columbia, and between the said District and the State of Virginia, and that he was assigned to his said duties upon a train of the defendant's composed of a motor car drawing another car called a trailer; that the said motor car was governed, operated and controlled by Wallace Groves, then and there a motorman, and an officer, agent and employee of the said defendant company whose duty was to start and stop the said train and to regulate its speed over the defendant's tracks, and that in the discharge of his duties the said Groves was on the front platform of the said motor car, and the plaintiff, in the discharge of his duties was on the rear platform of the said car; that the said train left said Alexandria at the hour of 10:30 o'clock P. M., destined for the said City of Washington, and passed upon the said Highway Bridge in the District of Columbia at about the hour of 10:45 o'clock P. M., of said day, and thereupon it became and was the duty of the said defendant, through and by the said Wallace Groves, its officer, agent, and employee, to stop the said train before passing upon the said draw and thereby notify the plaintiff of the train's approach to the said place where the overhead trolley wire was disconnected as aforesaid, and then to proceed slowly with the said train in passing said place so as to enable the plaintiff safely and securely to pull the said trolley wheel downwards off and from the said wire before the said wheel should reach the end of said wire where it was disconnected, and would violently fly off and from the same.

Yet the said defendant, not regarding its duty in the premises, through and by the said Wallace Groves, its said motorman, officer, agent and employee, negligently ran and propelled the said train without stopping the same upon the said bridge and draw in said District at a high and excessive and unlawful rate of speed, exceeding fifteen miles an hour, and whilst the plaintiff, who by reason of his post of duty, being on the centre of the rear platform of the motor car could not se or know of the near approach of the car to
4 the end of the draw where the wire was disconnected as aforesaid, was holding the said trolley rope in his hands awaiting

the stoppage of the said train in the usual and customary manner before passing up the said draw, the said train was negligently propelled and run at the speed aforesaid and without stopping upon the draw, causing the said trolley wheel to be thrown with great force and violence off and from the said wire where the same was disconnected as aforesaid, causing the trolley pole aforesaid to fly upwards and break, and violently pulling the trolley held by plaintiff as aforesaid upward, thereby jerking and throwing the plaintiff with great force and violence from the platform of said car, down upon the roadway of said bridge and his left leg being thrown upon one of the defendant's steel railroad tracks, was run over by the wheels of the said car called trailer, about two inches above the ankle joint, crushing and breaking the bones of his said leg, and mangling the flesh, muscles, and sinews thereof in so grievous a manner that it became and was necessary to amputate his said leg below the knee joint to save the plaintiff's life; that said injury to the plaintiff was caused wholly by the negligence of the said defendants through its said motorman, officer, agent and employee, and not by any fault or negligence on the part of the plaintiff. Whereby and by means of the premises, the plaintiff's said leg was amputated, and he was greatly bruised, hurt and injured in other parts of his body, and the plaintiff was obliged to, and did lay out and expend $250.00 in and about the services of a physician, and for medicines and an artificial foot and leg, and also the plaintiff became and was sick, sore, lame, and disordered and has continued so from thence hitherto, and was confined to his bed in the hospital for a long period of time and was thereafter unable to walk save with crutches for a period of four months and still has to walk with crutches at frequent intervals, and the plaintiff has also thereby become permanently injured, lamed, and deformed, and his strength and activity greatly affected and impaired, and also thereby the plaintiff has suffered and will continue to suffer great pain of body and anguish of mind and he has been and always will be prevented from attending to his necessary affairs and business or pursuing his usual avocation in life or from performing manual labor or earning a support and livelihood.

Wherefore the plaintiff brings this suit and claims of defendant Fifteen thousand ($15,000.00) dollars, besides costs of suit.

Second Count.

And the said plaintiff further sues the defendant, the Washington, Alexandria and Mt. Vernon Railway Company, a corporation duly incorporated, chartered and organized under and by virtue of the laws of the State of Virginia, and having an office, agents and officers, and doing business in the District of Columbia for that heretofore, to wit, on the 29th day of November, A. D. 1907, and for a long time prior thereto, the said defendant company had been and was such corporation and had been and was operating its cars over
5 certain railway tracks in the District of Columbia, laid along and upon divers streets in the City of Washington, D. C., from its station situated at the Southwest corner of Pennsyl-

vania Avenue and Twelfth Street, Northwest, to the intersection of B Street and Fourteenth Street, Southwest, from which point the said defendant owned, possessed, operated and controlled a double line of railroad tracks extending upon the said Fourteenth Street to the Potomac River and from thence to and across the highway bridge spanning the said river in said District, said tracks continuing through the County and City of Alexandria, Virginia, and the County of Fairfax to Mt. Vernon in said last named County and State; that the said defendant had been and was on the day and year aforesaid a common carrier of passengers and freight for hire, and was and had been engaged in trade or commerce in the said District of Columbia, and also between the said District and the State of Virginia by means of cars and trains of cars drawn and propelled over and upon the said railway tracks by motor cars supplied by electrical power and equipped with electrical machinery; that beginning at the north end of said highway bridge and extending over and upon the same, the said power was communicated to the motor cars by wire strung over the centre of said railway track in co-operation with a metal pole and spring attached thereto, one end of which pole was fastened to the top of the car; that the said pole extended over the top of the car aforesaid over and above the said car to a point above and over the rear platform of said car, at which end of said metal pole there was affixed an iron, steel or copper trolley wheel, with a grooved perimeter, which, by the force of the said spring was held in position against and underneath the said wire and received and communicated the said power to the motor car aforesaid; that at said pole's end to which was affixed the trolley wheel aforesaid, there was attached a rope reaching down to the said rear platform, which rope was used by the trolleyman or brakeman of the defendant to control and adjust the said trolley wheel to the overhead wire aforesaid when the said cars were to be drawn, driven or propelled on or over said railway, and to release said pole and trolley wheel from said overhead wire when the current should be shut off, as occasion required, in the operation and movement of said cars or trains under the signals or orders of the motorman or conductor; that the said overhead trolley wire conveying said power was strung over the said track and upon and across the said Potomac Highway Bridge, which was and is constructed with a draw, at either end of which the rails of the said track and the said overhead trollery wire were and are disunited and disconnected to permit the said draw to be swung or opened for the passage through the same of vessels navigating the said river; that the said defendant company had issued and given orders and commands to its motormen and conductors requiring them to bring defendant's cars or trains to a stop at either end of the said draw before attempting to run them across the same, and also had stop signs and signals erected at either end of the said draw, and it became and was the duty of the engineer or motorman controlling the movement of cars or trains, in obedience to said orders and signals, to stop the cars as aforesaid, and then to proceed with the said cars
6 slowly and with caution upon the said draw at said point of disconnection so that the trolleyman or brakeman, by means

of the said rope, could, before reaching said point or place in said wire, pull down the said trolley wheel off and from the said wire until the said point or place was passed to prevent the said wheel from becoming violently displaced from the said wire by reason of said disconnection and flying off and upwards of the said spring and damaging the same and the said bridge and cars; and the stopping of said cars on said bridge was notice to the trolleyman that the said point of disconnection in said wire was about to be reached and to be in readiness for the performance of his duties in respect thereto as aforesaid.

And the plaintiff says that on the day and year aforesaid he was employed by the defendant company as a trolleyman on its cars running over its said tracks in the said District of Columbia, and from thence to the said City of Alexandria in the State aforesaid, and that at the time of the injuries to the plaintiff hereinafter complained of said defendant also had in its employment Wallace Groves, who was then and there motorman of the said defendant, controlling the speed and movements of the said train upon which the plaintiff was then and there employed and in the discharge of his duties as trolleyman; that the said Wallace Groves had been for a long time in the said employment of defendant as said motorman, running its trains of cars over its said line of railway from the said City of Alexandria to the said City of Washington; that it became and was the duty of defendant not to retain in its service a mortorman whom it knew or by the exercise of reasonable and ordinary care on its part could have known to be negligent, unskilled, unfit, reckless and incompetent. Yet the said defendant not regarding its duty in the premises, to wit: on the 29th day of November, A. D. 1907 at the hour of 10:30 o'clock P. M. at the City of Alexandria aforesaid assigned Wallace Groves as motorman upon a certain trolley car with a trailer thereto attached to proceed from said Alexandria over said tracks and bridge to the City of Washington, and at the same time assigned said plaintiff to the discharge of his duties as trolleyman upon said train; that the said Wallace Groves at the time aforesaid and for a long time prior thereto had been negligent, unskillful, unfit, incompetent and reckless as a motorman of cars, of which facts the defendant had notice and knowledge, and by the use of ordinary diligence would have discovered and learned that he was a negligent, unfit and reckless, unskilful and unsafe motorman, and the said plaintiff had not notice or knowledge prior to the injury to him hereinafter mentioned and set forth that the said motorman was, for any reason or on any account, an unfit, negligent, reckless or unsafe person to act as motorman on said car; that the said train of cars left the said City of Alexandria at the hour of 10:30 o'clock P. M. on said day and passed along and over the defendant's said track under the control of said motorman, Wallace Groves, and was negligently, carelessly, recklessly and contrary to his duty run and propelled by him upon the said highway bridge in the said District without stopping the same
7 before it reached said draw, and was by the said Groves run upon the said draw at a high, excessive and unlawful rate of

speed exceeding fifteen miles an hour, causing the said trolley wheel to be thrown with great force and violence off and from the said wire where the same was disconnected as aforesaid, causing the trolley pole aforesaid to fly upwards and break, and violently pulling the trolley rope, which the plaintiff in the discharge of his duty as trolley-man was holding in the usual and customary manner awaiting the cars to stop as aforesaid, thereby jerking and throwing the plaintiff with great force and violence from the rear platform of the motor car upon which he was standing in the discharge of his duties aforesaid down and upon the roadway of said bridge, and his left leg being thrown upon one of the defendant's steel railroad tracks, was run over by the wheels of the trailer car of said train about two inches above the ankle joint, crushing and breaking the bones of his said leg, and mangling the flesh, muscles and sinews thereof in so grievous a manner that it became and was necessary to amputate his said leg below the knee joint to save the plaintiff's life; that the plaintiff was ignorant of the carelessness, recklessness and incompetency of the motorman aforesaid. Whereby and by means of the premises, the plaintiff's said leg was amputated, and he was greatly bruised, hurt and injured in other parts of his body, and the plaintiff was obliged to, and did lay out and expend $250.00 in and about the services of a physician, medicines and an artificial foot and leg, and also the plaintiff became *was* was sick, sore, lame and disordered and has continued so from thence hitherto, and was confined to his bed in the hospital for a long period of time and was thereafter unable to walk save with crutches, for a period of four months and still has to walk with crutches at frequent intervals, and the plaintiff has also thereby become permanently injured, lamed and deformed, and his strength and activity greatly affected and impaired, and also thereby the plaintiff has suffered and will continue to suffer great pain of body and anguish of mind and he has been and always will be prevented from attending to his necessary affairs and business or pursuing his usual avocation in life or from performing manual labor or earning a support and livelihood.

Wherefore the plaintiff brings this suit and claims of defendant the sum of Fifteen thousand ($15,000.00) dollars, damages, besides costs of suit.

EDMUND BURKE,
LEO P. HARLOW,
Attorneys for Plaintiff.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

EDMUND BURKE,
LEO P. HARLOW,
Attorneys for Plaintiff.

8 *Plea.*

Filed December 16, 1908.

* * * * * * *

Now comes the defendant and for plea to the declaration herein and each count thereof, says:

That it is not guilty as alleged.

D. S. MACKALL,
Att'y for Defendant.

Joinder of Issue.

Filed December 21, 1908.

* * * * * * *

The plaintiff joins issue upon the defendant's plea to the declaration filed in the above entitled cause.

EDMUND BURKE,
LEO P. HARLOW,
Attorneys for Plaintiff.

Memorandum.

March 21, 1910.—Verdict for Defendant.

Motion for New Trial.

Filed March 24, 1910.

* * * * * * *

Now comes the plaintiff and moves for a new trial for the following reasons: 1. Because of errors committed by the Court in rejecting and excluding evidence offered by the plaintiff before the jury to maintain the issue on his part. 2. Upon exceptions taken by the plaintiff to the rulings of the Court in rejecting and excluding evidence offered by the plaintiff to the jury to maintain the issue and noted upon the minutes of the Judge presiding. 3. Because the Court erred in sustaining and granting the motion of the defendant made at the conclusion of the plaintiff's evidence to take case from the consideration of the jury and direct a verdict for the defendant. 4. Upon exception of the plaintiff to the action of the Court in directing and ordering the jury to return a verdict for the defendant at the conclusion of the plaintiff's evidence, and noted upon the minutes of the Justice presiding. 5. Because the verdict of the jury is contrary to law, and to the evidence adduced before the jury.

EDMUND BURKE,
LEO P. HARLOW,
Attorneys for Plaintiff.

9 To Messrs. D. S. Mackall and John S. Barbour, Attorneys for the Defendant.

GENTLEMEN: Please take notice that the foregoing motion for a new trial in the above entitled cause will be presented and submitted to Circuit Court No. 2 of the Supreme Court of the District of Columbia on Friday the 1st day of April, 1910, at the hour of 10 A. M. or as soon thereafter as counsel can be heard for the action of the Court thereon.

EDMUND BURKE,
LEO P. HARLOW,
Attorneys for the Plaintiff.

Memoranda.

April 22, 1910.—Motion for new Trial continued from time to time until April 29, 1910.
April 29, 1910.—Motion for New Trial submitted.

Supreme Court of the District of Columbia.

FRIDAY, June 24th, 1910.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, Chief Justice presiding.

* * * * * * *

Upon consideration of plaintiff's motion for a new trial filed herein and heretofore submitted, it is ordered that said motion be, and the same is hereby granted. Whereupon it is further ordered that the verdict rendered herein be, and the same is hereby set aside and a new trial of this cause is hereby awarded.

Memorandum.

February 27, 1912.—Verdict for plaintiff for $5,000.00.

Motion for New Trial.

Filed February 29, 1912.

* * * * * * *

Now comes the defendant in the above entitled cause by its attorneys and moves the Court to set aside the verdict of the jury and grant a new trial and assigns the following grounds:

First. Because the verdict is contrary to the evidence.

Second. Because the verdict is contrary to the weight of evidence.

Third. Because the Court committed errors in the admission of evidence.

10 Fourth. Because the Court committed errors in the exclusion of evidence.

Fifth. Because the Court committed an error in refusing to grant the motion of the defendant, made at the conclusion of the plaintiff's evidence to take the case from the jury and direct a verdict for the defendant.

Sixth. Because the Court committed an error in refusing to grant the motion of the defendant, made at the conclusion of the defendant's evidence to take the case from the jury and direct a verdict for the defendant.

Seventh. Because the verdict is contrary to the law and the instructions of the Court.

JOHN A. BARBOUR,
D. S. MACKALL,
BASIL D. BOTELER,
Attorneys for Defendant.

To Messrs. Edmond Burke and Leo P. Harlow, Attorneys for Plaintiff.

GENTLEMEN: Please take notice that the foregoing motion for a new trial in the above entitled cause will be presented and submitted to Mr. Justice Gould, holding Circuit Court No. 2, on Friday, March the 8th, 1912 at 10 o'clock A. M. or as soon thereafter as counsel can be heard.

JOHN S. BARBOUR,
D. S. MACKALL,
BASIL D. BOTELER,
Attorneys for Defendant.

Memorandum.

Motion for new trial continued to March 29, 1912.

Supreme Court of the District of Columbia.

FRIDAY, March 29, 1912.

Session resumed pursuant to adjournment, Hon. Ashley M. Gould, Justice, presiding.

* * * * * * *

Upon consideration of defendant's motion for a new trial filed herein by its attorney it is ordered that said motion be, and the same is hereby overruled and judgment on verdict is ordered. Wherefore, it is considered that the plaintiff herein recover of defendant the sum of Five Thousand Dollars ($5,000.00) with interest from this date, together with costs of suit to be taxed by the clerk and have execution thereof.

From the foregoing judgment the defendant by its attorney, in open court, notes an appeal to the Court of Appeals, whereupon the penalty of the bond to operate as a supersedeas, is hereby fixed in the sum of Six Thousand Dollars.

11 *Memoranda.*

April 17, 1912.—Appeal bond filed.
May 10, 1912.—Bill of Exceptions submitted and time to file record extended to July 20, 1912.
June 28, 1912.—Time to file record further extended to October 1, 1912, inclusive.

Supreme Court of the District of Columbia.

FRIDAY, August 30th, 1912.

Session resumed pursuant to adjournment, Hon. Ashley M. Gould, Justice, presiding.

* * * * * * *

The court having this day signed the Bill of Exceptions heretofore submitted herein, as of the time of the noting thereof at the trial now orders the same of record, nunc pro tunc.

Bill of Exceptions.

Filed August 30, 1912.

* * * * * * *

Now comes here the defendant, by its attorneys and prays the Court to sign, seal and make part of the record, its bill of exceptions taken during the trial of this cause (heretofore submitted) now for then, which is accordingly done.

* * * * * * *

Be it remembered that the above entitled cause coming on for trial on the 15th day of February, 1912, before the Hon. Ashley M. Gould, Associate Justice of the Supreme Court of the District of Columbia, and a jury impaneled and sworn to try the issue between the parties, the plaintiff in order to maintain the issue upon his part joined, produced as a witness on his behalf JOSEPH G. HARRIS, who testified that he resides in the City of Washington; that on November 29, 1907, the date of the accident, he was acting as ticket agent in the employ of the defendant company; prior to that time he had acted as trolleyman and as guide; that he knew the plaintiff; railroad crew was composed of motorman, conductor and trolleyman; the trolleyman's position is between the two cars on either the rear platform of the motor car or the front platform of the trailer or rear car; his duties are to look out for passengers getting on or off and look after the trolley, watch out for signals, flag crossings and one thing another. Defendant company operated its train from 12th Street and Pennsylvania Avenue in the City of Washington, via Fourteenth Street over the highway bridge, and thence on to Alexandria City. It was operated by underground system north

12 of the bridge and overhead trolley from that point on. On the highway bridge the train was operated by copper wire suspended over the track, from which the trolley pole conducted the electric current to the car. This wire was disconnected at each end of the draw. It was the trolleyman's duty to pull the trolley down in passing on and off the draw at the point of disconnection between the trolley wires. Witness was instructed that the motorman should stop before reaching the draw and not start again until he got a bell from the trolleyman. There used to *have* a brass plate up there, I don't know whether it is up there. The trolley wheel won't pass over the disconnection at draw unless car is going real slow, if going fast you have to pull it down. There is a brass plate at the point of disconnection for the purpose of guiding the trolley wheel over this small disconnection in the trolley wire, which is three or four inches long. To the trolley pole is attached a rope which comes down between the cars for the trolleyman to use and guide the trolley with. Trolley pole is connected with a spring which keeps it in place.

Big steel or iron spring pretty strong heavy spring. It is a double spring about that big around (indicating). There are two trolleys on top of the car. One on the front end that comes out overhead where the motorman is, and one on the back which the trolleyman used. Both are about that far apart (indicating). The spring that holds the trolley up is on top of the roof of the car and fits on a plate and moves around and greased so that it can move backwards and forwards easily so that when the car turns a curve it will move easy without coming off. I have had trolley poles pulled out on this draw at the bridge. If you did not catch it in time it would fly off.

Thereupon Counsel for the plaintiff, over the objection of the defendant, based on the ground that the "Stop Sign" could have no relation to the operation of the trolley pole at the draw, offered in evidence the following regulation of the defendant company: "February 8, 1906. General Notice. Before crossing the draw, trains must come to a full stop at point indicated by a red board on which is the word "Stop." (Signed) J. Colvin, Superintendent."

The Court admitted this rule, over such objection, on condition that it should be shown to have relation to the operation of the trolley on the draw.

The stop sign was about five car lengths from either end of draw. Cars had to come to a stop at the draw where the signal was "stop" and the trolleyman was supposed to give the motorman a bell and when they came to a draw the trolleyman was supposed to pull the trolley down. After the cars come to a stop before crossing the draw, the motorman would start the car ahead; when he came to the draw the trolleyman was to pull the trolley down; he was supposed to shut his current off before the trolley struck the overhead wire at the draw; when he got over he would open up again and get a start and keep on going over the other end and do the same thing at each end of the draw. After he had stopped at the stop sign he could go ahead again when the trolleyman gave him the

signal, if the draw was not open. If the trolley was not
13 pulled down crossing the draw it would either break off, pull off, or burn your hands up with the rope, it was so strong that the rope would burn your hands—pull through your hands and burn you and pull you up; take you up in the air.

He knew Wallace Grove, motorman, all the time he worked there and also knew other trolleyman on road who knew Wallace Groves.

The witness was thereupon asked the following question by Mr. Harlow, attorney for the plaintiff:

Q. What was his general reputation among the men on the road as a motorman?

Mr. BARBOUR: If your Honor please, we object.

The COURT: Reputation as to what?

Mr. HARLOW: His reputation as a motorman.

The COURT: As to whether or not he was a skillful motorman?

Mr. HARLOW: Yes, sir; and as to whether or not he was a careful motorman.

The COURT: I will hear you, Mr. Barbour.

Mr. BARBOUR: The point of our objection is he has not laid the proper foundation for proving the reputation of this motorman in any respect. He says he knew other motormen on the road.

The COURT: He has not asked the preliminary question that is true.

Mr. BARBOUR: There is nothing to bring out the knowledge of that reputation amongst motormen.

The COURT: The first question, Mr. Harlow, was, whether he knew.

By Mr. HARLOW:

Q. Do you know what the general reputation of this man Grove was as a motorman?

A. Yes, sir; pretty reckless. I can say that much about it.

Mr. BARBOUR: If your Honor please, we object.

(After discussion.)

The COURT: It would not make any difference so far as the admissibility of the evidence is concerned about this man's personal acquaintance with Groves. It would be the knowledge of those who were employed with him, what they thought of his recklessness and carelessness.

By the COURT:

Q. How long were you with the company?

A. I could not say exactly how long.

Q. Well, approximately? Was it years or months?

A. It was over a month.

Q. Over one year?

A. Pretty close to two years.

Q. Covering this period of 1907?

A. Yes, sir.

Q. Were you with the company when this accident happened?

A. Yes, sir.

14 Q. How long prior to the accident?

A. About two months afterwards.

Q. Did you know any of the employees of the company? motormen, trolleymen and conductors?

A. I knew them all that time.

Q. Do you know what the reputation of Mr. Grove as a motorman was among those employees?

A. Yes, sir; it was pretty——

Q. First, did you know it?

A. Yes, sir; I knew it. I worked with him.

Q. It is not your own personal experience, but what the others thought of him.

A. Yes, sir; I have heard several of them say they would not work with him.

The COURT: I think he can state what his reputation was for carelessness or otherwise. It is only admissible if the knowledge is brought home to the company.

To the ruling of the Court in admitting said answer, the defendant then and there objected upon the ground that evidence of the motorman's reputation is immaterial, incompetent and irrelevant, which objection being overruled the defendant thereupon noted an exception, which exception was duly noted by the Court upon its minutes.

By Mr. HARLOW:

Q. Will you state what this man's reputation was generally among the employees of the road?

A. He was reckless and a lot of fellows was afraid to work for him. I was myself.

Upon cross-examination the witness said he did not know exactly when he was employed by the company, whether it was the last of 1906 or the first of 1907 the first of 1906 or the last of 1905. Worked there about two months after the accident, may be more but could not say. Was not called as a witness of former trial, nor was he employed by company at the time of the former trial. Cannot tell what year he entered the employ of the company, nor what time he left. At the time of the accident he was ticket agent and guide. Trolleyman is employed to stand there with his hand on the rope and hold it in the event the trolley wheel should jump, not necessarily supposed to hold the rope all the time. He generally watched out for it; had trolley pull out once on draw. This is not a usual occurrence. Unless you are going at a pretty good speed trolley will not jump off at the draw. Was supposed to watch out for trolley.

By Mr. BARBOUR:

Q. You said that Mr. Grove, the motorman, had the reputation of being reckless?

A. He was pretty reckless.

Q. Did you ever hear of his ever having any accident on that road all the time you served there?

A. I know one time that he went to Mt. Vernon, was going down to Mt. Vernon hill and he had a crowd of tourists on the car, he opened the front door and hollered "Look out, there's going to be a wreck down here."

Q. You hear- that?

A. Yes, sir.

15 Q. You don't know that that was so?

A. No, sir.

Q. That was with a young fellow by the name of Zimmerman?

A. I don't know who it was.

Q. That is the only thing that you heard of it?

A. I do not remember whether he had any accidents or not.

Q. Do you remember whether that occurrence was before the accident or after the accident?

A. Before the accident, I think. Motorman Groves never had any accidents while witness worked with him. Cannot say that he ever heard of any accident or anybody being hurt with Grove. That he had heard lots of fellows say they were afraid to work with him. Asked if the stop sign was not for the purpose of preventing the car from running through an open draw, witness replied "You used to stop there and lots of times people used to get on and ride; we used to load passengers on there." Then the trolleyman gave his signal to go ahead. When the front wheels of the first car strike the draw you know you are at the place where you ought to pull the trolley down. After stopping at stop sign motorman got bell from trolleyman to proceed and would slow up when he got to the draw to give trolleyman opportunity to pull down trolley.

Upon re-direct examination the witness testified that it was customary for trains to stop at the "Stop Sign"; that this was for the purpose of seeing whether the draw was open or not; that no other stop was made between the stop sign and the draw.

E. Forrest Burrell, a witness called on behalf of plaintiff, testified that he lived in Alexandria, Virginia. Employed at Washington Navy Yard. Knew plaintiff. Was a passenger on the train November 29th, when the accident occurred. Was sitting in front seat of trailer. Notice- that we ran pretty fast all the way from Alexandria. Did not make many stops. When we got to the draw of the bridge, I never paid any particular attention to it, except I knew we were going at a high rate of speed. Suddenly heard a crunching sound—sort of a jar under the car. At the same time lights went out. Jumped up and saw a man lying back on the tracks. Falls Church car was coming out from Washington; we put plaintiff on that. That was on south bound track. This car was backed to where our train was standing, and he was put on there and brought into 12th street station. This was on the 10:30 train from Alexandria, due in Washington eleven o'clock. Got in shortly before eleven—in a minute or so, I should say. Judge the delay due to the accident was three or four minutes. Don't know whether the

train stopped at B Street. Considered himself a fair judge of the speed of trains, he had used their cars twice daily for eight years. I should say it was about twenty miles an hour. I do not know whether the train stopped at the draw or not. If the train slowed down when it got there it was not perceptible. It did not stop at the "stop" sign. The lights went out about the same time that he heard the crunching sound. There might have been a second or so. When we picked him up Mr. Downey was lying very close to the *brake* in the draw, where the *brake* is between the draw bridge
16 and the draw proper. When I first saw Mr. Downey he was lying right near the *brake* between the draw in the bridge and the bridge proper on the south end of said bridge. From the time the lights went out the train traveled about one hundred yards before it stopped. He did not examine the trolley closely, but it was in pretty bad shape. Had to run in with the forward trolley; don't know how the train came to be brought to a stop; guess she ran about fifteen or twenty feet before the brakes were applied; somebody must have gone ahead, he guessed in front of the car; does not know; car ran about 100 yards after the brakes were applied; while the car was going the power had stopped; that he was one of the first to reach Mr. Downey; Downey was sitting on the track holding his foot with the shoe torn off on one side, and it looked as if the tendons and bones were exposed in his foot; that Downey was on the west of the rail of the north bound track, the track they were running on; that the defendant's road was through the District of Columbia into the State of Virginia and carry-s passengers and freight.

Upon cross-examination witness testified that he left Alexandria that night at 10:30, arrived in Washington a minute or so ahead of time, before 11, that he remembered it because he looked at Galt's clock to see how much time he had; that car made very few stops, if any, outside of Arlington Junction; could not tell of any other stops; that cars stop at the "Stop sign"; that he should judge about a car's length or a car and a half; could not say exactly; has no idea for the bridge is lighted up with a considerable number of arc lights both in the center of it and on the side; that Falls Church car came up almost to where Downey was lying; that in some places cars run or exceed 25 miles an hour, he should judge; he guessed in some places they run slower; that on this bridge they usually run about 10 miles an hour and then slow down gradually until they go to this stop sign; that after they got over the draw they run about 12 miles an hour; that witness has seen them run faster and that when they crossed the draw they go at a very slow speed.

Joseph W. Dodd, a witness produced on behalf of the plaintiff testified that he lives in Alexandria; that he was working at an acid plant; that on November the 29th, 1907, he was employed by defendant as trolleyman; that he began to work in March, 1906; knew Edward A. Downey, the plaintiff; that he has him for a couple of days breaking him in as trolleyman on this road; could not say how long before this accident; the conductor of his crew gave him in-

structions to break Downey in; witness said that when he first went on the road, trolleyman "Broke me in"; that train dispatcher would give new man order to "break in" and tell him to go with the trolleyman; that new man would go with order to conductor, who would turn him over to the trolleyman.

The following was propounded to the witness:

"What, if any, instructions did you give Mr. Downey when you broke him in, in regard to the stop sign on the draw at the bridge and the trolley arrangement at that?

17 Mr. BARBOUR: If your Honor please, we desire to object to that.

The COURT: I think that is admissible, especially if he will connect it up.

Mr. BARBOUR: We note an exception. (This exception was duly noted by the Court upon its minutes.)

A. I always instruct the trolleyman I break in when they get to the stop sign to get ready to pull the trolley down when they hit the draw. Of course you can tell when you hit the draw by the red gate there.

The COURT: What is that?

The WITNESS: By the red gate.

Q. The gates are at the draw itself?

A. Yes, sir.

Q. So when you hit the gate you also hit the draw?

A. Yes, sir.

The COURT: What do you mean by "Hitting the gate?"

The WITNESS: Why, the gates are closed when the draw is open on account of teams.

The COURT: By hitting the gates, you mean you are at the draw?

A. Yes, sir.

By Mr. HARLOW:

Q. The gates are on the draw?

A. Right on the draw where it opened.

Q. So when you passed the point where the gates are at the same time you pass the draw, do you not?

A. Yes; when you get even with the gates you are right even with the draw.

Q. What did you tell him about the stop sign?

A. Why, I told him the stop sign there is for the motorman to stop on account of the draw and wait for a signal to go ahead.

Q. When he stops does he have to have a signal to go ahead?

A. Yes, sir.

Q. Who gives that?

A. The trolleyman.

Q. The trolleyman gives the signal?

A. Yes, sir.

Q. Is that a rule of the company?

A. Yes, sir.

Q. Do you know whether or not that rule is in writing?

A. I do not, I believe it is."

Witness further testified that when the trolley hits that disconnection in trolley wire at the draw, it is liable to fly off; of course the motorman running real slow, it is liable to ride over, but that he always pulls his trolley down, in case it might get hung in the bridge and pull it out; that he instructed Mr. Downey that he should pull his trolley down when he reached that point; that after the motorman comes to a stop at the stop sign he always told him to get himself in position so he could pull the trolley down as he entered the draw, to always look out for the red gate; that of course there is no regular signal for the trolleyman when he reached that draw; that the motorman never gives you any signal; the trolleyman always looks out; that the stop sign is a long way from where they pull the trolley down.

Q. Is there any wire or anything in this said space that you speak of?

A. No, sir.

18 Q. Just open space?

A. No; it ain't exactly open space, you know, it is kind of a piece of iron run from the edge of the draw where it opens to the trolley wire; the reason they put it up there; they thought the trolley would ride over it; if they run real slow, as I say, it will ride over it.

Q. In going fast what would happen?

A. Well, if running 8 or 10 miles an hour it will not ride over it."

That trolleyman cannot see stop sign (which is right in the middle of track, hanging from roof of bridge) when standing in his position between the cars, unless the motorman stops right up to it; that roof is over where trolleyman stands on back platform of motor car.

Upon cross-examination, witness stated that he was in the employ of the company since 1906. That he did not testify at the former trial; that he was employed by this company as trolleyman for two years, from 1906 to 1908, and was a trolleyman at the time of accident; had no instructions from any of the office-s of this company as to what instructions he should give Mr. Downey; just told him what he thought was all right; what he was instructed from other trolleyman; company had printed rules as to the duties of trolleyman; these rules was furnished witness and to all other trolleymen; that it was the duty of the trolleymen to be on constant lookout; the trolley was liable to jump at any time; it was his duty to have his hands on that rope ready to prevent it flying up at any moment; that it was no more liable to jump off on the bridge than it was going through the country; that his duties on the bridge were just exactly what they were going through the country and if the trolley was liable to jump, it was safer to jump off on the bridge then it would be out in the country; that there are stay wires all along through the country and by the trolley jumping off it is liable to break these stay wires and pull the trolley out; in the country it is dark, and you can see much better on the bridge; a man cannot get on that bridge without knowing it; that it is all lighted up; nor can

he get to the draw without knowing it; he can see the long bridge on one side and the green lights against the channel; he can see there where he is approaching the channel and look to the other side and see the gates before he gets to the draw; it is the duty of the trolleyman to watch out for the draw; the gates referred to are gates that swing back to the side of the wall from 10 to 12 feet from the draw; if the trolleyman on the bridge was going north he could look out on the south side; as a matter of fact he can see for about 50 feet; the motorman does not give him any signal that you are about to get on the draw; the trolleyman can tell that by observation; he can tell by the lights on the opposite bridge, by the number of spans he crosses, and by the fact that the front trucks strike the draw; if he just watches out, there is no reason in the world why he should not know that his car is approaching the draw, and it does not make any difference how fast he is going; it is just as easy to witness to pull the trolley down when the car is going fast as when it is going slow; when the car is going fast it would make him more
19 particular to hold on to his rope, and when the car is going fast it is all the more the duty of the trolleyman to pull it down at this particular place; witness testified that he guessed the stop sign is about four car lengths from the draw; that it is three hundred or four hundred feet; that when he said car lengths, he meant train lengths, there being two cars to the train; the trolleyman, as far back as that stop, can see the draw if he looks out on the side; if he was standing in the middle of the first platform of the rear car, it would not be in his line of vision; they have danger signals there to indicate when the draw is open; and the gates were across that; you can see that danger signal from the stop; the trolleyman can see it as well as the motorman; it — part of his duty to look out there just as much as it is part of the motorman's; if the trolleyman thought that the train was going too fast, he could cut off the power by simply pulling down that trolley; there is not any trouble for him to stop the car if he wanted to; all he would have to do would be to pull down his trolley and signal the motorman to stop; there is no trouble about that; then, when the cars start off the motorman cannot go until he gets his bell.

Upon re-direct examination, the witness stated that the trolleyman's positions is between the two cars, either on the rear platform of the motor car or on the front platform of the trailer; that he generally stands in the middle of the trailer or in the middle of the motor car; in stopping at the "stop" point, he is supposed to look out around the sides to see whether his draw is open or not; that witness estimates that the stop sign was about four car lengths from the draw; the trolleyman ought to be able to see the stop sign when standing where he should stand when on that bridge; trolleyman cannot see stop sign at night when going over there at the rate of 20 miles an hour; there is no light on "stop sign" that the trolleyman that has been used to trolleying over that bridge generally knows when he gets to that sign, and if the motorman does not stop, then it is his duty to find out why the motorman did not stop; he could easily enough see when he gets to that stop sign by looking out on

the side of the gate; you can see the gate, witnesses supposes, for a quarter of a mile off, with red signals on them; when you get to the side of the car you could pull your trolley down at the same time going fast, the same as you could from the middle.

"Q. If you were going across that bridge at 11 o'clock at night, at the rate of 20 miles an hour, would you have time to get yourself into position to pull down the trolley from the time you felt the crunching of the front wheels going on the draw until the trolley hit the draw?

A. Yes, sir; you could pull the trolley down. Well, if you were standing on the side by the gate, if you were standing in the middle and heard that jar, you could pull it down in time."

Upon recross examination, the witness, upon being asked whether it makes any difference whether you see the green lights, how fast your train is going said it did not make any difference; that you can see them just as well going one hundred miles as standing still; that if a fellow is on the watchout for things he can see them; the sight of the green light is ahead of the train and you can see it as
20 soon as you get in sigh- of it. Witness further testified that he is not in the employ of the railroad company at the present time, that there is no obstruction on the side of the car; when trolleyman stands in position on rear platform of motor car, his face is about three feet from back door of the motor car; there is a roof over platform he stands on; when a train approaches the stop sign on the bridge and the motorman does not stop the train, it is the trolleyman's duty to pull him down—to stop him that "I can cut off his current and he can drift, if he has any start on him"; that if he does not stop, it is the trolleyman's duty to do that in the operation of the road; that witness has had the trolley fly off when he was holding the rope; that witness generally in that case, holds on to it and tries to put it on the wire again; you are liable to pull it out by hitting a span wires if you do not pull as quickly as you can; if you do not hold on; the trolley may fly up and pull the wire down; when it flies up, it has not sufficient power to pull you off the car.

By the COURT:

"Q. I understand there are two ways the car can be stopped, one by the trolleyman, if the motorman does not stop; one is by the trolleyman pulling the trolley down?

A. Yes; to find out what is the trouble with him, something might have happened to him.

Q. It is the duty of the trolleyman to stop the car one way or the other?

A. Yes, sir; if he did not stop when pulling those bells.

Q. In other words, under the regulation of the company, in the operation of the road, if the motorman goes by this stop sign on the bridge, it is the trolleyman's duty to stop the car one way or the other?

A. Yes, sir.

By Mr. HARLOW:

Q. Who told you there was any such rule or regulation?
A. We always did go by those rules if they went by the stop boards or anything like that.
Q. Did you at any time while you were on the road pull your trolley to make the motorman stop at that board?
A. No, sir.

Q. By the COURT: I will give counsel an opportunity to cross-examine on that.

Q. Can you tell me any rule or regulation of the company that tells the trolleyman that it is his duty to endeavor to stop that car at the stop sign if the motorman does not stop it?
A. It is his duty; yes, sir.
Q. Where does he get that from?
A. He gets it from the conductor; the conductor is generally up there, you know at the draw.
Q. Did any conductor ever tell you, or did you ever see any rule of the company that told you that is your duty?
A. No; never seen it, but we always do it.
Q. You never did it?
A. No, sir.
Q. I thought you said you had?

21 Mr. BARBOUR: He said he had not.

Q. Did you ever pull your trolley off your wire at that point to stop your car when the motorman forgot to stop?
A. No, I never forgot to pull my trolley off.
Q. What did you do?
A. Generally pulled the bell for him to stop.
Q. When would you pull the bell?
A. When I found out he was going to run by the stop-board, or tell the conductor about it; the conductor is supposed to see about that.
Q. Where is the conductor at that time?
A. Generally, at the north end of the bridge, if we are running south, he is taking up the tickets.
Q. If the motorman did not stop when he got to the stop sign, would you have sufficient time to leave your trolley and call his attention to it
A. You ain't supposed to leave your trolley; the conductor is always looking his own self.
Q. How could he be watching if he is taking up tickets?
A. I am talking about running south.
Q. How about running north?
A. He is generally in the back end of the trailer making out his report.
Q. You in all your experience have you ever pulled this trolley down to stop the car at that point?
A. No, sir.
Q. How was it stopped at that point?

A. I never did have a motorman to run by that stop board.
Q. Never had a motorman to run by there?
A. No, sir.
Q. If you never had a motorman to run by there, how did you find out that it was the trolleyman's duty to stop him?
A. The other trolleymen always instructed me if they ever run by a signal like that, to pull them down.
Q. By ringing the bell, you mean?
A. Yes, sir.
Q. If he ran by that stop sign at the bridge, would you pull that trolley down. Would that stop the car before you got to the bridge?
A. A certain distance—no; I did not say. It just depends on what kind of speed he had on him.
Q. Suppose he was running twenty miles an hour?
A. No; I would not stop him.
Q. How far over do you think it would run?
A. I could not say; I suppose three or four squares, probably.

GEORGE S. WHEDBEE, a witness produced on behalf of the plaintiff testified, that he resides at Alexandria, Va., that on the 29th of November, 1907, he was switchman at 14th and B Streets, employed by the defendant company. I only knew by name the motorman on that train the night of the accident.

Q. What, if anything, do you know with respect to his negligence in running past switches?

Mr. MACKALL: We object to that, if your Honor please, on the ground that it is immaterial and irrelevant, and not binding on the company if not brought to its knowledge.

Mr. BURKE: In the view that the counsel has made that
22 objection, it would probably be proper, but I am leading up to the company, concerning him, to be followed by proof of company's knowledge.

The COURT: This witness was a switchman and you want to prove by him that he knew it?

Mr. BURKE: No; that he communicated it.

The COURT: I will admit it.

Mr. MACKALL: We reserve an exception. This exception was noted by the Court upon its minutes.

And thereupon over the objection, witness testified as follows:

A. "Very frequently he approached the switches over the speed the company required, and it was my duty to report it to the foreman, which I did several times. I reported the condition in which he ran over the switches at 14th and B Streets; reported it to Mr. Green, foreman of underground system, over switchmen and over pitmen.

Q. Was that before Mr. Downey was hurt?

A. Well, before that he was a new motorman and they gave us green lights and they hired the new motormen and told us to hold the green lights up going around the curve there, and I gave him a signal and he never paid any attention to it; he ought to have ap-

proached us about 4 miles an hour going around the curve and lots of times he never notices it." Witness further testified that he saw Downey on Groves' car, with foot wrapped up in an overcoat. Groves stopped at 14th and B Sts., N. W., got off car and asked for telephone; told him there was no telephone there, then he got on car, pulled around 14 and B and stopped to get out on roof of motor car to work on trolley pole.

Upon cross-examination, witness stated that Mr. Green had no authority to employ or discharge men, as far as he knew; he, Green, was foreman of the underground system in the District and foreman over switchmen and pitmen; he never made any report to any other officer or representative of the road. Reported Groves to foreman 2 or 3 times for running past his signal across 14- and B streets switch at 12 or 15 miles an hour when regulation prescribed 4 or 6 miles an hour. The switch was at the bottom of steep hill where there is a curve, and was several times out of order, so there had to be a green light there or caution signal. That witness was employed by Green and had to make his report to him.

Witness was discharged by the defendant company.

WILLIAM C. LITCHFORD, a witness produced on behalf of the plaintiff, testified that he resides in Alexandria, Va.; that he was in the employ of the defendant company November 29, 1907, as trolleyman and conductor; that he began work in 1905, and was discharged in 1910.

Q. Let me ask you first, if during the entire time that you worked for this railroad, you ever knew of any regulation which required the trolleymen to pull down their trolley and stop the cars at the draw bridge in case the motorman neglected to do so?

A. No, sir.

Mr. BARBOUR: I object, if your Honor please. That is a leading question. He ought to ask what the regulations were.

23 That if car is running over six miles an hour, trolley will not ride across the disconnection at draw. That there was a written notice posted at the company's office at 12th and Pennsylvania Avenue in the conductor's room in the order book, as follows: "Reduce your speed to six miles an hour across draw." That said rule was not printed, in the company's book of rules. It was pasted on the order book by Mr. Colvin, superintendent.

Mr. HARLOW: We would like to call on our friends on the other side for the production of this order.

Mr. MACKALL: This testimony we object to unless we are able to produce the writing.

The COURT: Of course, if it was a written order the writing would be the best evidence, and if you want the writing you should give them notice.

Mr. MACKALL: Therefore, we object until they give that notice.

Mr. HARLOW: We called for that.

The COURT: You have not called in the proper way. You ought to give notice to produce.

Mr. BURKE: We did.
Mr. BARBOUR: When?
Mr. BURKE: At the last trial.
Mr. BARBOUR: If you did give notice the——
The COURT: It certainly does not help this case.
Mr. BURKE: Well, we will give you notice to produce. Will you accept the notice now?
Mr. BARBOUR: We will accept notice to produce. This is the first we have heard of any such order as this.
Mr. HARLOW: We asked for it at the last trial.

The COURT: When did you see that order first?
The WITNESS: When I was promoted conductor in 1907. The order was posted in the book and the conductors were supposed to read that book every day and sign their names; if they do not sign their names they serve time.
Mr. HARLOW: You mean by that, you are laid off?
The WITNESS: Laid off for so many days.
The COURT: That was the way the company gave notice to conductors?
A. Yes.
Q. The motorman was not required to look at it?
A. Yes, sir; the motorman was required to look at it and sometimes the conductors would read it and sign the motorman's name and go down and tell him what the order called for.
Mr. BARBOUR: So if there was such an order, your signature is attached to it?
The WITNESS: Yes, sir.

Mr. BARBOUR: We submit that it the best evidence.
The COURT: That is the best evidence unless you show the destruction of the writing.
Mr. HARLOW: They have agreed to produce and if they haven't got it, I understand this testimony is admissible.
The COURT: It will accepted.

24 Witness further testified that trolleyman standing in middle of rear platform on motor car or middle of front platform of trailer, could not see stop sign, because the car is all in front of him and platform overhead running 20 miles an hour at night, you could not tell where you were on bridge as the spans on the bridge "would come together fast like they were made together."

That running 20 miles an hour the trolleyman would have no notice that he was about to reach the draw or that the draw was about to be reached until the front truck hit the draw where the rails disconnect; that when the car stops at the stop sign, motorman is supposed to start again when he gets the proper signal from the conductor or trolleyman from the rear of this train; that the gates which have been spoken of were right at the end of the bridge next to the draw; that the end of the gate or the hinge is about two feet from the draw; that when you reached these gates if a train was running 20 miles an hour you would not have an opportunity to pull down your trolley before it got on the draw; that if a train

was running 20 miles an hour you would not have an opportunity to pull down the trolley from the time the front wheels of the motor went upon the draw to the time that the trolley reached this open space; that when trolleyman is in position and attending to his duty, he is supposed to stand on either the rear platform of the front car or the front platform of the rear car with his hands ahold of the rope; that he is not supposed to look out on either side of the car except to see whether a passenger is getting on or off, for the safety of the passengers; that he has nothing to do with the speed of the car or the starting or stopping of it, only by giving signals to stop to let off passengers at stations; stated that he knew Groves.

Q. Did you know other men on the road who knew him?

A. Yes, sir.

Q. Have you heard his reputation as a motorman discussed on the road?

A. No, sir.

Mr. BARBOUR: We object, if your Honor please.

The COURT: He says he never heard his reputation discussed by the motormen on the road.

Q. State whether or not you have heard the reputation of Mr. Groves, as a motorman, as regard- to his running cars discussed by other men on the road?

A. Yes, sir.

Q. Now state what the reputation was.

Mr. BARBOUR: If your Honor please, we object to this evidence, on the grounds as before.

The COURT: I will admit it.

Mr. BARBOUR: We not- an exception.

This exception was noted by the Court upon its minutes.

Witness answered that Groves was noted to be a fast runner; that if the train was running over that bridge at 20 miles an hour at night, the trolleyman would have no notice that the draw was about to be reached except when the car came to the stop sign; that there would be no other way of his telling when the draw was about to be reached.

On cross-examination by Mr. Barbour, witness testified that the trolleyman would know when he was on the bridge by hitting the other end; that it would not take long to reach the draw after hitting the end of the bridge going at 20 miles an hour; that he did not testify at the former trial of this case; that it was the duty of the trolleyman to stand with his hand on the rope continually, and that he must not take his hand off the rope while the car is in motion because the trolley is liable to jump and if he hits a span it will tear the span and knock the trolley out; this is the purpose of his being there; that it is his duty to do this going through the country, over the bridge, or anywhere else.

By Mr. BARBOUR:

Q. If the trolleyman is attending to his job there is no excuse for letting his trolley get away from him at any time?

A. Yes, the spring is liable to be too strong and jerk it out of his hand.

Q. Well, I know, if it is not too strong?

A. No, sir.

Q. He ought to have sufficient grip to keep it from getting up as high as the span wire?

A. No, sir; you are supposed to have a grip but to let it run through your hand high or low.

Q. And he must not have so much slack that it will get away from him?

A. No, sir.

Upon redirect examination by Mr. Harlow, witness testified that if the trolley flies off the rail you can hold it and put it back; that that is what you are there for, some springs are stronger than others, they reduce them down on tension rods. That there are no lights on gates at the draw.

JOHN T. CURTAIN, a witness called on behalf of plaintiff testified that he was employed by the defendant railway company as trolleyman in 1907; that there was a stop sign on the highway bridge about three or four car lengths, witness guessed, before you get on the draw; that in reply to the question "What was the object of the stop sign that was there?" witness replied "The man who broke me in always told me to stop there to signify to pull down the trolley, to watch for the draw and pull the trolley down"; that the gate at the draw was about seven or eight feet from the draw; that when we reached that gate we always pulled the trolley down, just reached right up and pulled it down; that witness was always in a position to pull the trolley down when he hit that gate; that when car stopped at the stop sign he gave them the bell signal to go ahead and got himself in position on the trailer to pull the trolley down, as soon as he struck the gate, witness pulled trolley down; that witness knew Mr. Groves; that he was working on the road at the same time as witness; that witness knew other men on the road that knew Groves.

Q. State whether or not you ever heard his (Groves') reputation for speed discussed among the men?

A. I have heard it discussed, yes, sir.

Q. State what his reputation was.

26 Mr. BARBOUR: We object to that on the ground that it is immaterial, incompetent and irrelevant.

The Court overruled the objection, to which Mr. Barbour, counsel for defendant excepted, which exception was duly noted by the Court upon its minutes.

In reply to the question, witness answered "He was pretty reckless—he was a pretty reckless man, as far as I could hear, they all talked; he was supposed to be one of the fastest men on the road for running."

Witness further testified that the trolley would not ride the intervening space in the draw if the car was going faster than six miles an hour; that he knew of no rate of speed over the draw or the regulation of the company in regard to it; that he never had a trolley to get away from him.

On cross examination, by Mr. Barbour, witness stated that he did not testify at the former trial in this case; that trolleyman must always hold onto the trolley rope and the faster you are going the more important it is; that is his duty; but a man cannot always hold onto his trolley; he has to ring the station bell with one hand and ring the signal bell with the other; that you could always tell when the trucks hit the draw; that you can always tell when you see the gates; that if a man looks he can see when he gets on the bridge; that witness did not know exactly how far it is from the end of the bridge to the draw; but he knew where it was and if a man (motorman) did not stop there he (trolleyman) could not pull his trolley down to the minute if motorman did not give him some whistle signal or bell or something; that a trolleyman could get on the bridge without knowing that he was on there; that he just has to keep his eyes open and that was all he had to do; that he never had a trolley rope pull him off the car when it flew up; that he weighs 145 pounds.

On redirect examination witness testified that he had tried to run trolley across this connection at the draw, but could not do it; "I held the trolley down and would not let it get away from me for if it hit the top of the bridge it would pull me off my feet."

HARVEY K. SHANER, a witness on behalf of plaintiff testified that on the 29th day of November, 1907, he held the position of conductor on the defendant road; that he was the conductor on the train on which Mr. Downey was injured; that this train did not stop or slow up at the south end of the draw; that he should judge that he was running about twenty or thirty miles an hour across the draw; that motorman went on the bridge at not less than twenty five miles an hour just as he told witness "I had her wide open"; that he did not change his speed up to the time he hit the draw; that he never cut his power off at all; that just as witness got to the draw, he heard a sound under the car, looked out of the rear window and saw Mr. Downey lying on the tracks; that he gave a signal for the motorman to stop and jump off and started to where Mr. Downey was lying; that Mr. Downey was lying right on the south end of the draw about four or five feet from the point
27 at which the draw connects with the bridge; that after he gave the signal to stop the car ran between two or three hundred yards anyhow; that he jumped off the car after he gave a signal to stop and the car did not stop; that when he jumped off, the car was running so fast it threw him clean across the roadway against an iron girder ten or fifteen feet from the track; that the lights went out at the time he heard the sound above referred to; that after the lights went out the car went clean across the draw, witness guessed, about one hundred yards the other side of the draw,

across the north end of the draw, before it stopped; that there was no power on car during that time; that witness went to the motor cab and asked Groves to back his train to where Downey was lying, telling him that he had run over Downey; that Groves said he could not back because his trolley was broken; that witness then stopped a Falls Church car, got on it and brought it to where Downey was lying, put him on this car and backed down to Groves' train which was not yet ready to go; that he put up front trolley pole on said train and held it on the wire until he got to the pit where he changed to underground system; that the train on which Groves was motorman during the time it was crossing the draw, and up to the time it stopped had no power because the pole had left the wire; that witness was delayed on the bridge not over ten minutes; that he got into 12th and Pennsylvania Avenue on about schedule time; that Downey's foot was cut right across just above the ankle, clean across the whole length of the foot, the leaders of the bones were all showing; that Downey's shoe had been torn off his foot when he found him; that before witness got to 12th and Pennsylvania Avenue; he stopped at 14th and B streets and went off and phoned for an ambulance to meet them at the station; that witness took the trolley pole off the car after the accident; that the pole was about ten or twelve feet long and about two inches thick; that it was of iron or steel; that it was bent and there was a crack on the underneath side; that it was bent in the shape of an elbow; that the motorman regulated the speed of the rain; that the motorman operates the brakes; that there are brakes for the trolleyman to operate, but only when he gets the signal from the motorman; that trolleyman had nothing to do with the controlling and operation of the car with respect to when it shall stop or when in motion; that motorman is responsible for schedule time and speed; that it is the duty of the trolleyman in respect to putting on and off the trolley, to watch out that it does not fly off the wire; that it is his duty to keep it on if he can; that it is the trolleyman's duty to release the wheel from the wire so that the train might proceed without trouble at only three points between Alexandria and Washington, that is, on King Street, witness thinks it is, just before you get to Columbus; at the bridge and at the plow pit; that if trolleyman undertook to interfere with the speed of a train by lowering the trolley wheel otherwise than at these points, it would have been witness' duty to report him; that he had no business to do
28 that, unless he had a signal to do it; that witness had taken about three trips probably four with Groves before this accident, on that day.

Mr. BURKE, counsel for plaintiff asked a question to this effect. "If a car stopped at the stop sign, how much speed could it get up between said stop sign and the draw?"

Mr. MACKALL: I object to that unless they fix a distance so that these gentlemen might have some justification for their statements.

Mr. BURKE: He fixes the distance from the stop sign to the draw.

Mr. MACKALL: He has not fixed the distance sufficiently to state whether it could get up speed.

The COURT: I do not think it will be necessary for him to know the distance, in feet, if he is competent to tell at all.

Mr. MACKALL: I also submit the question is immaterial and irrelevant, because no speed regulation has thus far been shown, and because the testimony so far shows that the question of speed has no effect on the operation of the trolleys by trolleymen.

The COURT: I think the testimony is fairly construed as showing that it was liable to fly off anywhere and he, the trolleyman, was there for that purpose, to keep it from flying off on the bridge or anywhere else. I am inclined to think this evidence may be admissible on a theory that I do not care to state in the presence of the jury, and as there was a rule here to stop at the stop sign, I think the question as to what rate of speed could be acquired by the time the south end of the draw was reached may be competent in one phase of the case if this man knows.

Mr. MACKALL: Your Honor will permit us to note an exception. This exception was noted by the Court upon its minutes.

The COURT: Yes. In the first place you want to find out whether he has any experience to qualify him to answer the question.

Witness stated that he had been a motorman on another line before the accident; that he had worked on cars ever since the first one came to Washington; that he had had 10 or 12 years' experience with motor cars; that (upon being questioned by Mr. Mackall) he had worked for the Capital Traction Company in Washington; that they had no air brakes on their cars; that they were not high speed cars; that sometimes they ran through the city at a low rate of speed; that he judged the distance between the stop sign and the south end of the draw was probably 75 feet, maybe a little more, and maybe a little less; that he had worked on su-rban lines in Pittsburg; that these cars were high-speed cars with trolley; that the cars operated by him in Pittsburg had motors similar to the Mt. Vernon cars.

The COURT: I am inclined to think that he is competent to testify.

Upon question by Mr. Barbour as to the character of the motor on the Pittsburg cars, witness stated that he really did not know the name of them and that he did not know the horsepower.

29 Whereupon, over the objection of counsel for the defendant company witness answered said question as follows: witness stated from his experience as a motorman, what he knew about motors, by forcing a motor, a motorman probably could attain a speed of from six to eight miles an hour after stopping at the stop sign up to the time he reached the south end of the draw.

Upon cross examination, witness identified a report of the accident made by him shortly after the accident; said that report showed that the train at that point on the bridge was going at the rate of ten miles an hour; that this report was not true when he made it and was made for the purpose of protecting witness from being discharged for not reporting Groves the motorman, for passing that place without stopping; that he found Mr. Downey's body on the draw pretty close to the south end; that after examining said report

in which he said that the accident happened "At the north end of the draw" witness testified that what he meant at the time he wrote the report was that it happened north of the south end of the draw; that in the report he stated that the place of the accident was the highway bridge north of the draw; that the purpose of the stop sign for the safety of the train in general by this, witness testified that he meant the passengers, the company property employees and all; that he always considered the stop sign a warning to the trolleymen; that whenever you are running with overhead power it is the duty of the trolleyman to stand there all the time with the rope in his hand; it is liable to fly off at any time; that from a stop, the distance it would take a motorman to get up a speed of fifteen or twenty miles an hour would depend on whether he forces his motor; it would hardly take three or four or five hundred yards; the breakers are on there so that they will fly out if a man forces his motor which they (the breakers) some times but not always do.

EDWARD A. DOWNEY, the plaintiff, being first duly sworn, testified that he resides at Alexandria Virginia, was in the employ of the Washington Alexandria and Mt. Vernon Railway Company on November 29, 1907, at the time of the accident; that he had been in said employ 14 days in October and 18 days in November, as trolleyman; that his average wages were one dollar per day; that he is married and has six children; that on the train leaving at 10:30 that night Mr. Shaner was conductor and Mr. Groves motorman; that witness judged that train was moving at from 25 to 30 miles an hour when it reached the highway bridge; that when it reached the bridge, the train should come to a full stop, and the motorman would touch his foot on the gong bell, give two bells to see that everything was all right ahead; that then you give him a signal, one bell, to proceed, that is the cord bell if everything was all right; that he never had seen any rule with respect to speed crossing the draw but had been instructed by the trolleyman who broke him in, that cars must proceed very slowly when entering upon the draw; that when you get to the draw where the draw parts, then you pull the trolley down; then when you pass the point of disconnection, you would put it up; that he had always done that; that when he reached the south end of the bridge, witness judged the train was going 20 or 25 miles an hour; that the spans were going past him very fast; it was drizzling snowlike, and the snow would come down and strike you in the face like mist or rain; that after he got on the bridge he got himself in position to wait until he made the stop; and that the train went past this draw and the trolley flew off and threw him down between the cars; that he had hold of the rope; had the rope in his hand; that the train did not make any stop at all, did not slow down any; that he was waiting for it to stop; that the train was going so fast and the spans passed him so quick he did not have any idea that they were approaching the draw; that he was standing on the rear end of the motor car facing the motor car on the platform, which is about four feet wide; that the only way he could tell the location of the car and himself with respect to the draw

was by the car stopping; that standing in the position that he was, he could only see along the sides of the bridge at an angle from the car (Indicating); that in crossing the bridge, he looked from one side to the other, but could not tell where he was; that he held the trolley rope in his right hand; that when they arrived at this bridge span, the trolley went up and he went down between the cars; that the first notice that he had that he had reached the place where the trolley was to be pulled down, was when he was down underneath the cars, that the trolley pole was on top of the car and extended over the platform, and the rope connected with it comes down; that the base of the trolley pole is about two inches, the end about one and one half inches.

Q. When you arrived at this bridge span, what happened to you?

A. The trolley went up and I went down between the cars.

Q. I believe you stated that you were running 20 to 25 miles an hour?

A. About that, sir.

That the trolley pole went up; that witness was standing on the platform and it threw him right down backwards between the cars; that it was done very quickly; that witness supposed the tension in the pole going up, threw him off; that he had hold of the rope at the time; that he never had a trolley fly off there before; that the car ran over his left foot taking his shoe entirely off, and skinning his foot down to the toe, like you would skin a catfish; that the leaders were all exposed and the heel was numb; that when he found himself after the accident, he was on the draw; could not exactly state the position.

By Counsel for Plaintiff:

Q. Can you approximate how far the train went before it stopped after you had fallen off and been injured?

A. I judge about nearly two squares, about six or seven *or seven* hundred yards.

Q. You mean seven hundred feet, don't you?

A. I couldn't *not* tell exactly because I was in so much misery. I just could see the lights in a distance.

31 Mr. Mackall: I want his answer to his question, whether he means yards or feet?

Mr. Harlow: He said two squares.

Mr. Mackall: I understand that you asked him whether he meant six hundred yards or feet.

The Witness: I judge about a square and a half; I could not tell you exactly.

Mr. Burke: Then you do not mean six hundred yards?

A. No, I could not say six hundred yards; no.

Q. About six hundred feet?

Mr. Mackall: We do not want you to testify, Mr. Burke.

Witness further testified that a man came and put him on the Falls Church car and that car backed down to the train and I got

up to the platform and walked in, just hopped like that (indicating), and sat down in the rear seat of the trailer on the right hand side; that they proceeded up to the car station, made one or two stops, and they put him in an ambulance, and took him to the hospital, where his foot was amputated; that it is still sore and he suffers a great deal with it, and will have to have it amputated again; that he cannot use an artificial leg in the condition his leg is now in; that he has been for one month running a labelling machine for the Robert Portner Brewing Company; that he could not work in winter; that the snow was so deep he could not walk.

Witness was then asked the following question:

"What instructions were given you as to the crossing of that draw by those who broke you in?"

Mr. BARBOUR: "If your Honor please we object to that on the ground that this is no more than a school; more that than anything else. The men do not act under any instructions while breaking in. The men come up there and they first teach them the road and then they are brought up for examination before the officers of the road and they are examined as to the rules of the road by the officers."

Before ruling on the objection the Court questioned the witness. In response to the questions by the Court witness testified that they had men to break the trolleymen in; that he received instructions sheet of paper from company agent at 12th street station, either Mr. Whedbee or Mr. Hayden to whom he had been sent by Mr. Colvin the Manager and they told him what to do.

Objection of the defendant was overruled by the Court, and defendant's counsel then and there noted an exception, which exception was duly noted by the Court upon its minutes.

"A. I was told that the train comes to a full stop at the south end or the north end of the draw, going north or going south, at the stop sign, the purpose of stopping there was to prepare you to pull down your trolley when you come to this parted rail. I have always pulled it down when I crossed that. I never had it to pass over. I always got myself in position to do my duty."

Witness said that he could not recall that he was told anything as to the speed cars should run across the bridge; that when the car stopped at stop sign he would give the motorman one bell to proceed; that his duties when the car stopped at the stop sign were to get himself in position to make this point where the wires break and pull the trolley down when he reached there; that the wind was blowing very hard at the time of the accident; that his health was excellent before the accident but since the loss of his leg he does not feel like himself.

32

Upon cross examination, plaintiff testified that at certain points it was his duty to hold on to that trolley rope; that it was his duty to hold on to it as much as he could; that his instructions were to hold on to the trolley rope but he could not do it all the time because, in addition to holding the trolley rope, he was instructed that in approaching each station, trolleyman should go into each car and call out that station and after the car stopped at the station to

do likewise; that at these times he could not hold on to the trolley rope; that it was also a part of his duty to open and close the gates and then he could not hold the rope; that he had to open the gates when the cars were in motion approaching a station; that he had nothing to do on that bridge that night except to hold the rope; that he knew they were *were* on the bridge; that he knew they were going from 20 to 25 miles an hour, going as fast as they could run there; that he could not tell exactly how long it would take to get to the draw; that he could not see why it was necessary to pull the trolley down; that by pulling the trolley down he could cut off the power, but he was not instructed to do that, he could do it; that it would cut off the light; that he could not tell exactly whether that "stop sign" is three hundred feet from the draw; that after starting from a stop sign, after you have given him the bell to go ahead, he cannot now recollect if he, the motorman, gives you any further signal that you are approaching the draw; that he was not supposed to; that you had to keep a watchout and judge as to when was the proper time to pull the trolley down.

Q. How did you tell that?

A. By two big upright columns, some portions of the bridge. That the columns were about 6 or 8 feet from north end of draw.

Witness further testified that the usual rate of speed he judged of these trains between Alexandria and Washington is about 25 to 30 miles an hour; that he never took any particular notice whether he was going any faster than usual that night making that trip; that he might have been going faster and might have been coming slower.

Q. How about when he struck the bridge? Was there anything unusual about that?

A. Well, he was going pretty rapid.

Q. Was he going more rapidly than usual. Did that attract your attention?

A. No, not necessarily.

Q. There was nothing then about his speed on the bridge to attract your attention?

A. Well, I do not know how to answer that question.

Q. Do you know whether your attention was attracted that
33 night by any unusual speed on the bridge?

A. Well, it was snowing, you know.

Q. You do not know whether your attention was attracted or not; is that right?

A. No; I do not think there was anything. It has been so long I cannot remember.

Witness further testified that he thought the object of trolleyman giving the bell when the cars stopped is to protect passengers, and object of motorman's bell is to protect trolleyman.

Q. When you get on this bridge after the train is stopped, as it was the custom at the stop sign, and you go on the draw, you pull your trolley down when you pass on to the draw?

A. Yes, sir.

Q. Then when you go off you do exactly the same thing?

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do likewise; that at these times he could not hold on to the trolley rope; that it was also a part of his duty to open and close the gates and then he could not hold the rope; that he had to open the gates when the cars were in motion approaching a station; that he had nothing to do on that bridge that night except to hold the rope; that he knew they were *were* on the bridge; that he knew they were going from 20 to 25 miles an hour, going as fast as they could run there; that he could not tell exactly how long it would take to get to the draw; that he could not see why it was necessary to pull the trolley down; that by pulling the trolley down he could cut off the power, but he was not instructed to do that, he could do it; that it would cut off the light; that he could not tell exactly whether that "stop sign" is three hundred feet from the draw; that after starting from a stop sign, after you have given him the bell to go ahead, he cannot now recollect if he, the motorman, gives you any further signal that you are approaching the draw; that he was not supposed to; that you had to keep a watchout and judge as to when was the proper time to pull the trolley down.

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A. Well, it was snowing, you know.

Q. You do not know whether your attention was attracted or not; is that right?

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Witness further testified that he thought the object of trolleyman giving the bell when the cars stopped is to protect passengers, and object of motorman's bell is to protect trolleyman.

Q. When you get on this bridge after the train is stopped, as it was the custom at the stop sign, and you go on the draw, you pull your trolley down when you pass on to the draw?

A. Yes, sir.

Q. Then when you go off you do exactly the same thing?

A. Yes, sir; the train is going very slow.

Q. And you have to watch out for yourself to know when to do that. You do not get any sign or signal from anybody?

A. Yes, sir.

Q. It is exactly the same thing coming off as it is going on?

A. No, the motorman gives you a bell.

Q. He gives you a bell for what?

A. With the foot.

Q. For what?

A. That you are passing that point.

Q. What point?

A. Where the draw is open, where the wire is.

Witness was then asked the following questions:

"Q. Well, didn't you pull that very trolley down repeatedly?

A. Well, once or twice I guess.

Q. Didn't you pull it down twice every time you crossed the draw?

A. Yes, sir.

Q. You pulled it down with one hand?

A. Yes, sir.

Q. No trouble about it?

A. Wasn't very hard to pull like this.

Q. No trouble to pull it down?

A. Yes, it is a right smart trouble. I guess you have to use your main strength. I was pretty strong at that time.

Witness further testified that he had to wrap that trolley around his hand to pull the trolley down several times that night at the time of the accident, he was paying attention to the trolley; that the trolley pole got away from him before he knew it and the rope pulled him off the car; that he was standing on the platform waiting for the car to stop; that at this point where the danger is, it is his duty to hold to the rope and get himself in position; when he found himself after the accident he knew he was on the draw because there is a watch box about the center of the draw which witness believes the watchman stands in and when he noticed where he was, he was opposite this box; did not see anyone in the box, and did not call to anyone in there.

By Mr. BARBOUR:

Q. At this very place it was your duty to hold the rope so that if the trolley did get off you would be in a position to restore it to the wire if it comes off?

A. Yes, sir.

By consent the following rules from defendant company's official book of rules for the governing of its transportation depart-
34 ment in effect at the time of the injury were admitted in evidence: that defendant furnished plaintiff with said book of rules.

"Rules 69. The motor bell must be rung before starting a train, and when running through tunnels and along the streets of towns or cities."

"Rule 118. Conductors and motormen will be held equally responsibly for the violation of any of the rules governing the safety of their trains, (in Italic) *and they must take every precaution for the protection of their train, even if not provided for by the rules.*"

"Rule 119. *In all cases of doubt or uncertainty take the safe course and run no risk.*"

"Rule 317. Trolleymen report to and receive their instructions from the road foreman of motors. They must obey the orders of the Train Master, and when at the car houses they are under the direction of the car house foreman. When with the motor, the trolleyman must obey the orders of the motorman respecting the proper performance of his duties.

The trolleyman must report for duty at the appointed time; assist in shifting and making up the train when required; assist the motorman in keeping a lookout on the track for signals and obstructions; take charge of the motor during the absence of the motorman; assist in cleaning the motor after each trip and making repairs when required. He must not run a motor in the absence of the motorman, unless in some emergency he is directed to do so by the conductor or some one in authority. He must be familiar with the rules that apply to the protection of trains and the use of signals, which he must be prepared to use promptly; and must examine the bulletin board before starting on, and at the end of each trip."

It should appear here that in response to the call by plaintiff's attorneys for an alleged regulation as to speed on the bridge, the attorneys for the defendant company produced and put in evidence the book containing all orders of the company issued from the date when cars were first operated on the bridge up to and including the date of the accident, and stated that no order fixing the speed on the bridge had ever been issued, except a temporary order made subsequent to the accident as follows:

"Train order No. 82, dated February 4, 1908:

Notice to Trainmen. About five inches broken off rail three spans from north end of the draw on the south bound track. Train will reduce speed to about six miles per hour in crossing over this place."

It should also appear in this connection, that the books so produced were blank books in which the dated written orders and regulations to conductors and motormen, not contained in the Company's printed book of rules, were pasted and were subscribed by the conductors and motormen on the page and beneath the order to show that they had notice of the promulgation of the orders when given and pasted in said books and that on two of the pages in one of said books, two of such orders which had been pasted therein and signed underneath on the page of the book by the witness, William
35 C. Litchford, et al. were missing, but there was no evidence tending to show that said missing orders related to the regulation of the speed of cars or trains the dates of the missing orders antedates the accident.

Thereupon, at the close of the plaintiff's case, the defendant, by its counsel, moved the court to instruct the jury to return a verdict

for the defendant, upon the ground that there was no evidence of negligence on the part of the defendant and that the proximate cause of the accident was the plaintiff's own negligence; also upon the ground that the evidence of the plaintiff did not support the allegations of the declaration, and that according to the evidence, neither the alleged excessive speed, nor the "stop sign" had any relation to the operation of the trolley at the draw, and that this cannot be relied upon as tending to establish negligence, and on the further ground that the provisions of the Employer's Liability law of June 11th, 1906, so far as the same are valid, do not apply to employees of an electric railroad, engaged in transporting passengers between a point or points in any state to a point or points within the District of Columbia.

The Court overruled this motion, to which action of the Court, the defendant, by its counsel, then and there noted an exception, which exception was duly noted by the Court upon its minutes.

Thereupon the defendant, in order to maintain the issue on its behalf joined offered as a witness CHARLES A. SINCLAIR, who testified that he is a civil engineer in the employ of the Washington-Virginia Railway Company, and resides in Philadelphia.

Witness identified a map showing the location of the draw on the highway bridge across the Potomac River; also the location of the "Stop Sign." Witness testified that the map was made by him and the measurements thereon were made by him; that the distance between the stop sign which is on the north of the south end of the bridge, and the south end of the draw, is three hundred and eight fee-; that the distance between the "stop sign" on the north end of the bridge and the north end of the draw is three hundred and Seven and seven tenths feet; that the length of the draw is two hundred and ninety two, and fifty five hundredths feet; that all lights on the draw are located on the map;

(Here follows drawing marked page 35½.)

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that all the measurements and data shown on that map were made by him personally, and are absolutely accurate; that the watchbox is within a few feet of the center of the draw; that the approximate distance from the south end of the bridge to the south end of the draw is seven hundred feet and from the north end of the bridge to the north end of the draw 1,600 feet.

36 The said map was thereupon offered and received in evidence and is hereto attached and made part hereof.

On cross examination witness testified that the length of the gate at the draw is 12½ feet and that the end of the gate when at rest is about 5 feet from the draw.

CHARLES GILL, a witness produced on behalf of the defendant testified that he is a watchman on the highway bridge across the Potomac River and has been down there about six years; that he is in the employ of the United States Government under the Engineer Department, under the War Department; that during the past six years the War Department has had exclusive control over that bridge; that he has seen a sign on that bridge, one at one end of the draw and one at the other, with the words "Stop" on it; that it had been there ever since the bridge was opened for traffic; that it is in the same place that it was when he went there; that it has never been changed; that there was no speed limit on this bridge at the date of this accident; that there was sufficient light on there for all purposes of operating the draw, etc., that there are four side arc lamps and two across in the center on the draw; that there are three signal lights on top, still higher, that makes nine; that in addition to those lights there are two large arc lights at each end of the draw; that the map as far as the lights is concerned is correct.

Upon cross examination witness stated that the War Department exercised exclusive, authority over the bridge; that he was there to regulate the traffic and that there was no regulation covering the subject of speed.

CHARLES MUMFORD, a witness produced on behalf of the defendant testified that he is engaged by the Washington-Virginia Railway Company at Arlington Junction, selling tickets; that he has been in the employ of the company and its predecessor, the Mount Vernon Railway Company, for 19 years; that during all that time he has been a motorman; that he entered the employ of the company in 1892 and continued as a motorman until October 1911; that he knew Wallace Groves, became acquainted with him in 1907; that he broke in Wallace Grove as motorman; that Grove was a competent man and was accepted by the company; that he had him under his instructions until he was fit to be turned in; that he had taken him all over the road; that he had told him how to handle the car, taught him the road and schedule and everything he could teach him; that he Groves, had had previous experience in handling a car, and was a skillful man; that witness is familiar with the duties of a trolleyman; that trolleyman is supposed to stand on the platform and have hold of the rope all the time; that his pur-

pose in standing on the platform is to pull the trolley down in case it jumps; that if the trolley jumps and gets away, it flies up and comes in contact with those wires; that it does not require any more effort to pull down a trolley wheel when it is going fast than
37 when it is going slow; that there is no difference in the effort required; that the trolley can be pulled down with one hand that they pull from 20 to 25 pounds; that during the time he has been in the employ of the road he has never seen any rules touching the speed on the new highway bridge; that he cannot recollect seeing any regulation as to speed covering the draw; that in the course of his duty he would have been aware of such regulation if any existed; that it was the trolleyman'- duty to constantly hold the rope throughout the trip when the car was going; that he would hold on to the rope constantly throughout the trip in case it should fly off; that it is liable to fly off at any time; that it is more apt to fly off when the car is going fast than when it is going slow; that he did not see how it was possible for a man to be on the platform, either the front platform or the rear platform of any train going across that bridge at any rate of speed up to 25 miles an hour without being aware of the fact that he was on the bridge; that he can certainly tell the bridge when he comes to it; that he can see it, and can tell by the sound of the train if he was inside the car; that he does not see how it would be possible for him to enter on that bridge without seeing the superstructure of the bridge; that it would not be possible for him to approach the bridge at night without seeing the lights on the bridge; that when a trolleyman is at the "stop sign," he could see as far as the draw from the rear platform of the motor or the front platform of the trailer, if he looked around the side; that a man could see that easy; that he could see the draw from where he stopped; that there were good lights on the bridge and you could see them right plainly; that witness always saw it from the "Stop Sign" in the draw; that the bridge is lighted as brilliantly as one of the main avenues here; that the "Stop Sign," is a safety stop; that the stop at that point was to keep from going into the draw; that that was the main reason the sign was put there; that witness does not know of any other reason for it being put there; that witness believes that was the main one, to keep from going into the draw should it be open; that he never had any difficulty in seeing the different *spand* of the bridge; that the operation of pulling the trolley down so that the current is taken off, takes but an instant; that when the front truck hits the draw you can hear the bump; it is a wider place between the rails on the draw than any other place on the bridge; that it makes a different sound when you hit the draw; that the distance between the front wheels of the motor car and the point where the trolley wheel comes into contact with the trolley wire, is about 25 or 30 feet; that witness does not believe the speed of a train has any effect upon the question of pulling the trolley down; that witness never worked as a trolleyman.

Upon cross-examination witness testified that it does not make any difference whether the car is going 5, 10, 15 or twenty miles an hour, that it does not require any more effort to pull the trolley

down at 20 miles an hour than it does at 5 miles an hour as far as witness knows; that of course, a man is supposed to be attending to his business all the time; that witness does not see where it
38 requires any more care at all to pull it down at 25 miles an hour than at 5 miles; because if you were pulling it down, it is out of the way of everything and cannot hit anything; that the conductor has to sign the rule book every morning; that witness does not recall any rule regulating the speed on the draw, but does not say there was no such rule; that the rule regulating speed on the draw might have escaped his observation; that the conductor frequently would go upstairs and see rule where it was posted sign motorman's name, and tell motorman what it was, without motorman seeing it; that witness never had any set speed for operating car on the draw; that sometimes according to what was on the draw, if a wagon was pretty close on to draw there, sometimes, witness would not go over there over three miles an hour, sometimes five, eight, or ten miles an hour, something like that; that if there was nothing in the way and no wagons around anywhere, he might go over there ten miles an hour; that he never neglected to stop at the "Stop Sign."

In answer to question by the Court, witness testified that after stopping at south stop sign, he might possibly get up a speed of 15 miles per hour by the time he reached draw, running on a dry rail and not more than 5 or 6 miles an hour on a wet rail when it was snowing; that trolleyman could not see stop sign unless he looked around the side of the car; that witness never took his car across the bridge at 25 miles an hour; that snow or fog would make a difference as to ability of one to see spans.

Fenton M. Fitzhugh, a witness produced on behalf of the defendant, testified that he is a motorman on the Falls Church road; that he was engaged in the same work on November 29, 1907; that on that night, was running from Washington to Fairfax; that he passed car Downey was hurt on while it was standing on the north end of the bridge; that he saw the plaintiff, who was sitting on the left hand side of witness's car almost in between the tracks, near about the end of the first span from the north side of draw—the north side of draw, next to Washington, that in going up to get the plaintiff, they did not go on the draw at all but passed safety stop north of draw just before you go across draw, where we stopped, then proceeded up to where some men were standing around Downey, and stopped there and put him on our car and brought him back to the Alexandria car; that they got to the Mount Vernon car before they got to the safety stop going down to pick Downey up; that plaintiff was sitting in the neighborhood of 50 feet from the north end of the draw; that witness had been running over that bridge since the Falls Church cars started running from Washington to Fairfax, about the first of June, 1907; that so far as witness knew, there was no speed limit on the bridge at that time; that the usual place for passing this car was somewhere between Maryland Avenue and Fourteenth Street, and the north end of the bridge,

somewhere in Potomac Park; that they left Washington on time that night and got to Arlington Junction about ten minutes late; that witness was sure that their car never got on to the draw at all before finding the plaintiff; that the defendant company and
39 the Falls Church Company use the same tracks, from the 12th Street Station in Washington across the bridge to Arlington Junction.

Upon cross examination witness testified that his car did not exactly stop at point where Mount Vernon train was standing; that he slacked up to see what the trouble was; that he went down to safety stop on north side of the draw; that further on up, towards the draw he saw some men gathered around Downey, and took his car up there; that they put him on witness' car and backed to the Alexandria car and put him on that; that witness then continued on to his destination, which made him about ten minutes late in getting to Arlington Junction.

On re-direct examination, witness testified that he was running one car and did not have any trolleyman; that the conductor attended to the trolley; had no mechanical arrangement for pulling down trolley on witness'es car.

By Mr. BARBOUR:

Q. What about trolley riding on these cars?

A. Running at a very low rate of speed it will ride, that is, if both spans are together straight across.

Recross-examination by Mr. BURKE:

Q. What do you call a very slow rate of speed?

A. Well, about two miles an hour, was usually as slow as I can go—very slow.

CHARLES GILL, a witness recalled for further examination by the defendant testified that there are seven spans on the bridge, north of the draw, and four spans south of the draw, which with the draw makes twelve altogether; that each span is approximately 230 feet long and that the draw is 290 feet long.

EDGAR O. BROOKES, a witness produced on behalf of the defendant, testified that he lives at Farlee, Alexandria County, and is employed as a carpenter; that at the time of the accident he was a conductor on the Falls Church road; that he left Washington that night about 10:45; that Mr. Fitzhugh was his motorman; that as they were on the bridge his motorman slowed up and passed Mount Vernon car, about one and a half spans from north end of bridge; that they were going southward; witness' car went ahead until they came to the stop sign on the bridge; that witness looked out the side of the car and saw his motorman step to the east of the car; that a man was sitting up next to the car with a couple of men standing around him; that he had his foot cut off or partly cut off; that they put the man on their car and carried him back to the Mount Vernon train; that the man was

Mr. Downey; that he Downey, was beyond the draw, north end of the draw, on the main part of the bridge, somewhere about 50 feet from the draw; that it may not be quite that far; that witness had been going across that bridge from the time the Falls Church cars first started into Washington; that at the time of this accident, there was no speed limit on that bridge to witness' knowledge.

By Mr. BARBOUR:

Q. Are you sure that Mr. Downey, when you got to him, was sitting in the track north of the draw?

A. He was sitting about on the west track near about across the rail on the west bound track on the north end of the bridge, the north end of the draw.

Q. How far from the draw was he? I believe you stated that?

A. About 50 feet.

On cross examination witness testified that Downey was on the west side of the north bound track which is the east track.

WALLACE L. GROVES, a witness produced on behalf of the defendant testified that he resides in New York and has been living there for about sixteen months; that he is a motorman for New York Railway; that in November 1907, he was employed by the Mount Vernon Railway Company as motorman; that he was in charge of the car that Mr. Downey was engaged on as trolleyman at the time of the accident; that witness had been in the employ of the company for about six months prior to the accident and remained with the company until the following April; that prior to that time he had been a motorman with the Capital Traction Company; that he had resigned from that company and they, at that time, gave him a letter stating that he was a competent motorman; that about a week later, he went into the employ of the Mount Vernon Company; that at the time they agreed to employ him, he was still in the employ of the Capital Traction in good standing; that for two days he was with a motorman named Mowbrey and then with a man named Munford, during the time that he was being broken in on the Mount Vernon road; that after he was broken in, he was examined by the train dispatcher, Mr. Hayden; that from that time on, he never had a bit of trouble while in the employ of the Mount Vernon Company; does not remember of having had any accidents prior to this one, but might have had a wagon collision or something like that; that he was laid off for ten days for missing his run during the month of August; that that was the only time; that on the night of November 29, 1907, they left Alexandria at 10:30 with the train in good condition, and made the regular stop as usual at the stop sign; that he received the proper signals to proceed in crossing the draw; that he heard one bump of the trolley pole and about a second or two later received three bells, and thinking everything was al- right to stop at the next station, began to feed the controller, and found that he had no current; that he received another bell and thought there was some-

thing wrong; that he applied the brake to make the stop; that as the car stopped the conductor came running up and said that Downey had fallen down between the cars and got run over; that he stepped from the car and looked back and saw Mr. Downey sit-
ing between the tracks; that his intention was to get him to
41 the hospital as quickly as he could, that looking north, he saw the Falls Church car coming south and the idea struck him that he would have this Falls Church car bring Mr. Downey down to his train; that they placed Mr. Downey on this Falls Church car and brought him back to the rear end of the witness'es train; that near Potomac Park witness asked policeman to have an ambulance at the station; that they placed Mr. Downey in the emergency ambulance; that witness then took out the old trolley pole which was bent and placed in a new one, finished the rest of the trip to Alexandria and then made a trip to Washington; that they arrived in Alexandria and put another trolleyman on the train; that he is sure that he made the stop at the stop sign on that night, and received the proper signal to proceed; that at the north end of the draw, where the spans are disconnected, he heard the trolley strike, and subsequently received three bells, which meant to stop at the next station; that there was no mishap with the car or with the trolley when they passed on the draw; that they went along all right; that he was due on the bridge about 10:53 that night; was there on time; that he thinks they got into Washington about 10 or 12 minutes past 11; that they usually passed that Falls Church car, that they saw approaching that night, somewhere along in Potomac Park; that the cab of his car was cut off by a solid partition from the rest of the car, without lights, so that the fact that the lights went out in the car would not be communicated to him; that they had two head lamps, one an arc light and one oil lamp; that the arc light was cut off that night; that they always cut it off at the south end of the bridge, because they had such good light on the bridge, and naturally did not need it; that witness cannot state exactly at what speed they entered the draw that night, but it was very slow; that he had no cause to go fast; that it was about six or eight miles an hour, maybe; that he never heard of any speed regulation on the bridge at that time; that he never heard of there being any regulation of the company that there was a six mile speed limit on that draw; that the "Stop Sign" is a safety stop to show that you have the car under control in approaching the draw; that his car was under control that night; that he had never heard of any rule that the trolleyman is supposed to receive any signal from the motorman that he is approaching the draw; that witness had never used any and that there is no such rule in the rule book.

Upon cross-examination witness stated that he remained in the employ of the company after the accident about 6 months, residing in Alexandria during that time; he supposed that they were on the bridge about 9 or 10 minutes adjusting the train and waiting to have Mr. Downey put aboard the train, that he did not have any drinks of whiskey that night; did not have a bottle of whiskey in his pocket; that he does not remember at what speed he was going when

he reached the bridge; that he stopped at the stop sign certainly; that he visited Mr. Downey's home after the accident, but does not know how long afterwards; that he made one visit only; that he saw Mr. and Mrs. Downey in the room; that he had no private conversation with Mrs. Downey separate from her husband about the accident; that he was invited there by Mr. Downey, but did
42 not see him before the visit; that he went to Alexandria and heard in Alexandria that Mr. Downey wanted to see him; that he knew where Downey lived in Alexandria and went to his home; that they were all talking in the room; that in that conversation he did not tell Mrs. Downey that he was to blame for the accident nor say that he was sorry for Mr. Downey; that he did not say that he was running the train wide open across the bridge that night; that he did not say he would do anything for Mr. Downey that he possibly could except that he would not swear that he did not stop at the stop sign, because that would make him liable to a fine and imprisonment; that Downey told him that he had entered suit against the company and witness laughed and they went on talking about the thing; that he put it up to witness that witness did not stop there that night; that he wanted to make witness believe that witness did not stop and the accident was due to the witness'es negligence and that witness told him it was not; that Mrs. Downey, said "You had better help my old man to get some money;" that this was about a year after the accident.

By Mr. BURKE:

Q. How near were you to the north end of the bridge when you stopped?

A. I suppose about a span or a span and a half.

Upon further cross examination witness said that he understood the question to be how far he went after he left the north end of the draw until he stopped and said that he stopped 5½ spans from the north end of the bridge "somewhere in along there" or a span and a half from the north end of the draw. Witness further testified that there are six or seven spans from the north end of the draw to the north end of the bridge; that when the Falls Church car came up he got on its front end.

By Mr. BURKE:

Q. How far did that train go before it reached Mr. Downey?

A. Well, it went over surely a span and a half from my train until it reached Mr. Downey, after it left my train.

Q. You were a span and a half from the draw?

A. Yes, sir.

Witness upon being further question- testified that he met Mr. Nolan Mr. Downey's brother-*and*-law, at Royal Street Station in Alexandria and that they went down to see Mr. Downey together; that Nolan was present and heard the conversation; that that was the only visit that witness made; that he did not state at that conversation that he had been fired from the company, nor that he was glad they had kept him as long as they did and that since he had been fired from the company he was willing then to testify that he

had not stopped at the stop sign; that he did not in the presence of Mrs. Downey and Mr. Nolan say that he was then willing to testify that he did not stop or that he was running at a reckless rate of speed across the draw; that the only money paid to him by defendant was $25, paid at the last trial, his expenses and the time he lost; that it was paid in cash; that at that time he was living on a farm with his father at Ashburn, Virginia (Loudoun County) 25 miles from Washington; that the railroad fare was $1 and
43 that he was 5 days in attendance at the last trial; that the defendant company wrote him a letter that it would pay his expense to come on for this trial and pay him for the time he would lose; that Mr. Shaner did not get on Falls Church train going back; that the train went back for Mr. Downey and went over a span and a half from witness' train; that witness was a span and a half from the draw; that the train that went back for Mr. Downey did not go within 25 or 30 feet of the draw; that Mr. Downey was put on the front end of this Falls Church car.

Upon redirect examination witness testified that prior to this accident he had no knowledge of ever having been reported by Mr. Whedbee, a watchman for running past his signals.

PERCY E. CLIFT, a witness produced on behalf of the defendant testified that he resides in Alexandria, Virginia and is superintendent of the Mount Vernon division of the Washington-Virginia Railway Company; that in November 1907, he was master mechanic for the Washington, Alexandria and Mt. Vernon Railroad Company; that trolley poles are adjusted to balance a weight of seventeen pounds, swung to a little hook that brings the trolley pole right on a direct line with roof, when it is swung to that; that there is a tendency for the tension on a trolley pole to decrease, on account of the nut on the span working lo-se; that witness would run on the road when they were short of motormen and that he had to examine the bulletins to be familiar with them; that on July 8th 1907 he was appointed assistant superintendent by general order; that he did not know of any regulation prior to November 29, 1907 prescribing a speed limit of six miles an hour on the draw; that he does not know of any subsequent order that was issued; that he recalled on one occasion that they had a broken rail about the second span on the southbound track from the north end of the draw, and there was an order posted in the office at that time for trains to not *to* exceed a certain speed over that particular spot while they were putting in the rails; that he does not remember the date of said order; that witness identified train order number 82 dated February, 4th 1908 offered in evidence, said order reading as follows:

"Notice to trainmen: About five inches broken off rail three spans from the north end of the draw on the southbound track.

Trains will reduce speed to about six miles per hour in crossing over this place."

Witness further testified that he had experience as a trolleyman and motorman; that the speed of the train does not effect the trolley-

man's ability to pull his trolley down or control it; that it is an instant-eous movement and he can pull it down just as easily when the train is going fast as when it is going slow.

PETER DENT EVERETT, a witness produced on behalf of the defendant, testified that he is Division Superintendant of the Capital Traction Company; that he knew Wallace Groves; that Groves was employed by his company for about two years and 9 or ten
44 months; that duties of witness required him to be in daily contact with Groves; that Groves was a motorman for his company; that about ten days after Groves left his company he, Groves, went to work for the Mount Vernon Road; that witness thinks that he was a careful man in the performance of his duties as a motorman; that if he had failed to perform his duties he would not have stayed with the Company two years and nine months.

JOHN DUTERMAN a witness produced on behalf of the defendant testified that he is assistant superintendent of the Washington-Virginia Railway, Falls Church Division; that he has paid particular attention to the overhead work on the highway bridge; that the trolley wire attached to that bridge is the same distance from the overhead work of the bridge now as it was in 1907; that he brought in the first Falls Church car that came over that bridge, and the construction there is the same now as it was then; that the overhead braces on that bridge are approximately between 32 and 35 feet apart; that those braces are about 7 inches wide and five inches high, that they go clear across; that the wire is fastened on them; that the trolley wires are attached about six inches below these braces so that if the trolley went up only six inches it would strike the iron eye beams on the bridge; that there are six of them to each span, and that they extend across the bridge about 32 feet; that this is true of the draw as well as of the other positions of the bridge; that he never saw any regulation governing the speed limit on that bridge at that time.

GEORGE GREEN, a witness produced on behalf of the defendant testified that in November 1907, he was foreman employed by Mr. Colvin, the superintendent; that he knew Mr. Whedbee, who was the switchman located at 14th and B Streets; that Mr. Whedbee did not make any reports whatever; that Mr. Groves had run by the signals; that he had never made any reports whatever to him about Mr. Groves.

Upon cross-examination — testified that he did not know D. P. Hurley, who lives near him in Southwest Washington, but had talked to two men whose names he did not know, who came to his house and asked him if Mr. Whedbee had made any reports about Mr. Groves. Witness said "I told him no"; that witness did not tell him that he could not recall whether he had made any report; that he did not say to Mr. Shaner and Mr. Pennifell the day before witness was examined and while in attendance in the Court House, that he wanted to see Mr. Travers defendant's claim agent, and that he

was waiting for him and that if he did not "come across" he would "go in and knock hell out of this case."

EPPA MCDONALD, a witness produced on behalf of the defendant testified that he is train dispatcher for the Washington-Virginia Railway Company; that he was acting dispatcher on the night of November the 29th, 1907, but was a regular motorman; that it was his duty to make a record on the train sheet taken from the conductors' time notes; that he does not know where those
45 records are at present; that he had custody of them at the last trial, but has not seen them since; that he has made a search for them but they cannot be found; that the train in question was delayed 10 or 12 minutes, he could not say exactly the delay; that he made a notation on the train sheet; that the train was due at 11 o'clock; that the running time from the 12th street Station to Arlington Junction was 10 minutes; that the running time from the 12th street station to the north end of the highway bridge was not shown on the schedule; that it took him six minutes including regular stops when he was running as a motorman; that he was in a position at that time to know of any speed regulation, but never heard of any speed regulation in force on that bridge; that there was no speed regulation at that time covering speed, that he knew of, none on the bridge or the draw; that they generally tried to abide by the District of Columbia regulation.

On cross-examination witness stated that the District regulations were 8 miles an hour; that he understood from the man who broke him in that he was to run at from 8 to 10 and not over 12 miles anyway; but that it is a little more after you get out of the basin; that as near as witness could remember there was a delay of 10 or 12 minutes on the train in question; that if there had been no delay it would not have been written up.

WELLINGTON C. CROCKETT, a witness produced on behalf of the defendant testified that in November, 1907 he was employed as conductor on the Mount Vernon Railway; that at that time he was acting inspector; that he was on duty the night Mr. Downey was hurt; that he trolleyed after that train got in from Washington To Alexandria, taking Mr. Downey's place; that the car returned to Alexandria and came back to Washington; that another trolleyman relieved him in Alexandria; that he came in as far as Royal Street; that Mr. Groves went into Royal Street with him; that to the best of his recollection, Groves came back on the next trip to Washington; that the train on which Downey was hurt got in at 12th and Pennsylvania — about 8 or 10 minutes late; that he has been employed about 20 years with the company; that at the time of the accident they had no regulation governing speed on that bridge; that if there had been a regulation in force, he would have known it as that was one of his duties as inspector; that they had an order book in which all order- in regard to such things were posted from time to time and it was his duty to look at it from day to day; that he had trolleyed *from* different times; that the trolleyman is

supposed to give signals, look out all the time for signals and look after the manipulating of the trolleys all the time; that the speed at which a train is going does not have any effect on the duty of the trolleyman; that all he is supposed to do is to stand there and hold the trolley and keep it on the wire, in case it jumps off to put it back again, but that is the thing that is liable to occur any time anywhere or any place; that there is a way of telling when you are on the bridge; that when you leave the "T" rail going on to that girder rail there is a different sound; that the sound
46 when you strike the bridge is more hollow than on the overhead trolley; when you leave the south end of the bridge there is a "T" rail; that a man who could not see at all could tell whether he was on the bridge; that the stop sign is a precaution for all trains in case the draw should be open, to see that everything is clear before proceeding across; that the tension of the trolley pole is from 17 to 18 pounds; that the trolleyman can either stand on the front of the trailer or on the rear of the motor; that in bad weather the more comfortable place is on the rear end of the motor.

HARVEY K. SHANER, witness for defendant being called for further cross-examination testified that at the former trial he stated that he gave the proper signal to stop after he became aware of the accident, and that the proper signal was three bells; that this testimony was given through mistake that the signal to stop at the next station is three bells.

By Mr. BARBOUR:

Q. Didn't you testify at the former trial just as I have read it to you?

A. Yes and tried to explain it afterwards.

Mr. BURKE: You can state what explanation you have to make about that, Mr. Shaner.

The WITNESS: The question was that simply Mr. Groves told me afterwards that he got two bells, and then one bell, and what I wanted to say at the other trial was that those bells looked so hard to tell, and at the time I wasn't positive whether he had given the two bells, because he didn't stop.

By Mr. BURKE:

Q. Thinking you gave him three bells?

A. Yes.

By Mr. BARBOUR:

Q. Did you say anything of that kind on the former trial?

A. No, sir, I just tried to tell you that and you didn't give me a chance to do it.

Mr. Barbour, on behalf of the defendant offered to prove by the stenographer who reported the testimony at the former trial that no witness was produced at the trial to establish any regulation of the company governing speed on the bridge, to which testimony plaintiff objected. Said objection was sustained to which action of

the court the defendant noted an exception which exception was duly noted by the Court *by* its minutes.

Whereupon the defendant having closed its testimony, the plaintiff in rebuttal offered as witness EDWARD A. DOWNEY the Plaintiff, who was formally examined in this case, who testified that after the amputation of his foot he was at the hospital 12 or 14 days and then went home in Alexandria; that a few months, it might have been a month or two afterwards, he received a visit from Wallace Groves, who was then still working for the defendant company; that
47 Groves came into the dining room next to the kitchen and witness' wife was present; that he came of his own accord and uninvited; that he made another visit there sometime after he was discharged from the road and at this visit witness' wife and Charles Nolan, his brother-in-law were present and talked with him; that witness also talked with him for a while; that Groves said he was going to California and that he would do everything he could for witness; that witness should let him know when the case came up; that Groves said when he took the cars across the bridge, he had the motor car wide open; that Groves said he blamed himself for the injury; that he didn't like to say that he didn't stop at the stop sign because he was liable to be fined for it; that Groves said that he was going across there at a reckless rate of speed, 60 miles and hour and had her wide open; that witness cannot say whether the conversation with him took place on the first or second visit; that both conversations were before suit was filed; that the second visit was after Groves was discharged by the railroad company; that witness then testified that he could not recollect which it was the first or the second visit.

JOHN P. HURLEY, a witness called on behalf of the plaintiff in rebuttal testified that he lives on 13th street Washington, D. C., that he is not related to the plaintiff and has no personal interest in the case; that he knows George Green who testify for the company; that he had a conversation with Mr. Green last Sunday as to whether he had ever received a report from Mr. Wheelbee regarding the recklessness of motorman Groves; that Green said he didn't remember Mr. Wheedbee reporting Groves to him for running by signals or being reckless.

WILLIAM PENNIFELL, a witness called on behalf of plaintiff in rebuttal, testified that he lives at No. 1907 Pennsylvania Avenue, N. W., that he is not related to the plaintiff and has no personal interest in this case; that he had talked with George Green who testified that morning in the hallway yesterday of the court building; that he said to witness at that time that he was waiting for Mr. Travers and that if he, Travers, "did not come across" he was going to "knock hell out of his case"; but the last time witness saw Green in the hallway, he was there about 20 minutes and witness had seen him at various times at the court house during the day.

Upon cross-examination witness testified that he did not know

Mr. Downey or his wife but that witness' wife, knew Mrs. Shaner and came down to the Court with Mrs. Shaner; that witness is a house painter.

SUSIE F. DOWNEY, a witness called on behalf of the plaintiff in rebuttal testified that she is the wife of the plaintiff and that they reside at No. 401 Wolf Street, Alexandria, Virginia; that she is slightly acquainted with Wallace Groves; that two weeks after her husband arrived from the hospital, Groves called at the house without any invitation; that she admitted him and he went into the dining room; that Mr. Downey treated him very coolly; that her husband and children were present; that Mr. Groves said
48 that he was sorry for the accident to her husband; that he felt that he was to blame for the accident and that it was the worst he had ever had on the road; that he was willing, if Mr. Downey would enter suit to do all he could, except acknowledge that he didn't stop at the stop signal as he would be subject to a fine and he hadn't anything to pay a fine with; that on the occasion of both of his visits he made the same assertion that he had the train wide open, and if the train could run at 60 miles an hour, he was making it; that Groves made a second visit to the house when her brother Charles W. Nolan was there, and they had another conversation and Groves made the same statement as before; that at that time he was discharged from the railroad and said he was going to California, that he said he had asked for a recommendation and they refused him, and he thanked them for keeping him as long as they did; that he said to Mr. Downey that he was prepared to do anything he could for him then; that this second visit was about three or maybe six months after the first visit; that witness cannot state the exact time; that on the second visit, Groves said he was willing to say that he did not stop at the sign, which he should have done; that he said that Mr. Travers had met him and told him if he would stand by the railroad he would get his position back and that he replied to him "I am not that kind of man, I would not allow myself to be sold to a railroad company."

Upon cross-examination, witness testified that at the first visit of Groves, her husband did not stay in the room but a short time; that he did not treat Groves with the proper respect that he should in his own home; that at the second visit, Groves talked about having been to Richmond; that at this time, witness knew that Groves was not with the railroad; that he said he had been fired, but expected the railroad to give him a recommendation, and they had refused to give it for any other road; that at the second visit, her husband, her brother, her children and herself were all in the dining room; that her husband had not entered suit at that time; that he was waiting on the Company; that Groves addressed the conversation to her brother and her; that her husband had very little to say; that at the second visit, her husband did not greet Groves as if he was glad to see him; that statements of Groves were voluntary on his part, but witness may have asked him some questions; that witness had no communication with Groves after the suit was filed;

that she could not say whether any effort was made by Downey or his counsel to find Groves.

CHARLES W. NOLAN, a witness called on behalf of the plaintiff in rebuttal testified that he resides in Alexandria Virginia; that he is a policeman and brother of Mrs. Susie F. Downey; that he was at his sister's house after the accident when Groves came there; that he cannot tell the exact date; that he did not invite him; that in the conversation there in the room Groves said that he felt that he was the cause of the accident and that he felt sorry for Mrs. Downey; that he, Groves, went across the draw with his con-
49 troller wide open; that he cannot state the time of the conversation, or how long after the accident.

Upon cross examination, witness testified that he had worked for the defendant company on two different occasions; that he had been discharged; that he was present at only one time when Groves was at Downey's house; that he could not tell how long it was after the accident; whether it was a day, a week or a month, but that it was a short time after Downey came from the hospital, but not a year; that witness did not testify at the last trial; that he was present, but did not tell Mr. Burke of Mr. Harlow what he knew at that time; Witness later admitted that he did testify at the last trial that he had run a motor; that he did not consider that testifying.

JOSEPH COLVIN, a witness produced on behalf of the defendant testified that for about 11 years he was superintendent of the Washington Alexandria and Mount Vernon Railroad Company and ceased to be such in the spring of 1908; that he was superintendent on November 29, 1907, when the accident occurred to Mr. Downey; that all orders in reference to the regulation of speed were issued by witness, and that there was no speed regulation governing the highway bridge and that there was never any ordinance limiting the speed to six miles an hour on the draw.

WALLACE GROVES, a witness previously examined on behalf of the defendant, was recalled in sur-rebuttal, by the defendant and testified that he had never been discharged by the Mt. Vernon Railroad.

Thereupon the defendant, by its counsel, moved the Court to instruct the jury to return a verdict for the defendant, upon the ground that there is no evidence of negligence on the part of the defendant, and the approximate cause of the accident was the plaintiff's own negligence; also upon the ground that the evidence of the plaintiff did not support the allegations of the declaration, and that according to the evidence, neither the alleged excessive speed, nor the "stop sign" had any relation to the operation of the trolley at the draw, and that this cannot be relied upon as tending to establish negligence, and on the further ground that the provisions of the Employer's Liability law of June 11, 1906, so far as the same are valid, do not apply to the employees of an electric railroad engaged

in transporting passengers between a point or points in any state to a point or points within the District of Columbia.

The Court overruled said motion in the following language:

"The only reason I see for allowing this case to go to the jury is the fact that the motorman did run this train on the bridge at an excessive rate of speed, which possibly prevented the trolleyman from performing his duty."

To the action of the Court in overruling said motion the defendant thereupon duly noted an exception, which said exception was noted by the Court upon its minutes.

50 And thereupon the plaintiff by his attorneys tendered to the court seven several prayers numbered respectively 1 to 7 inclusive and prayed that the same be given and read to the jury which said prayers are as follows:

(1) "You are instructed that it is the duty of a railway company, acting through its agents and servants, to exercise ordinary care to prevent and avoid injury to its other employees while engaged in the discharge of their duty; and to that end it is the duty of the servants and employees of railway companies in charge of and operating trains and cars to exercise ordinary care to prevent and avoid injuring other employees working or employed upon said cars, and the failure on the part of such railway company's employees in charge of the movements of such trains or cars to exercise such ordinary care and prudence is negligence.

(2) "The jury are instructed that if they believe from the evidence that the trolley would jump or fly off from the wire at the south end of the draw when the car was proceeding rapidly and at a dangerous rate of speed when entering upon the draw, and that it was under all the circumstances of and facts surrounding the case and in evidence before you, a negligent and imprudent act for the motorman to run said car at a rapid rate of speed upon the draw, and if you believe from the evidence that the train was run at a rapid and dangerous speed by the motorman, Groves, upon and over said draw at the time of the accident to the plaintiff, which speed prevented the plaintiff from pulling down the trolley pole, caused the trolley to fly off at the south end of the draw and jerk or throw the plaintiff off the car while he was in the proper discharge of his duties, and that the said rate of speed was the proximate or direct cause of the accident and injury to the plaintiff, they may find a verdict for the plaintiff."

(3) The jury are instructed that if they shall believe from the evidence that the end of the draw where the wire upon which the trolley wheel ran and was operated was a dangerous place by reason of the liability of the trolley wheel to fly off from the wire while the train *were* proceeding in entering upon the draw at a rapid rate of speed, it was incumbent upon the defendant to make, prescribe and promulgate proper rules and orders for the guidance and government of its employees or motormen in running cars past the said point, and if they shall further believe from the evidence that said place in said wire was dangerous as aforesaid and that the defendant made no such rule or regulation governing the speed of its train at

said place and that because of such failure to prescribe any such rule, the train was run by the motorman at said point at a rapid and dangerous rate of speed which was the proximate cause of the injury to the plaintiff, the jury may find the defendant company guilty of negligence and a verdict in favor of the plaintiff.

(4) The jury are further instructed by the Court that if they shall believe from the evidence that it was the duty of the plaintiff by means of the rope to pull down the trolley wheel at the end of the draw, and that the plaintiff was at the time of his injury
51 at his post or duty holding the rope and in position and intending to pull down the wheel as the train was about to enter upon the draw and that the train was run by the motorman upon the said bridge and past the stop sign and on to and upon the draw at such a rapid and unusual rate of speed as thereby to prevent the plaintiff from ascertaining or knowing or acquiring notice when the train passed upon or was about to pass upon the draw and that he had no notice thereof by reason of his position on said train or otherwise, then the jury may find the plaintiff was not guilty of contributory negligence in failing to pull down or release the trolley wheel from the said wire.

(5) "The jury are the exclusive judges of the credibility of the witnesses and the weight to be given to the testimony and all questions of negligence by the defendant, and of contributory negligence of the plaintiff are to be determined by the jury."

(6) "The jury are instructed that in the District of Columbia where an employee of a railway company, engaged in the discharge of his duties, is injured by the negligence of another employee or servant of the company also so engaged, the railway company shall be liable to the person injured for all damages which may result to him by reason of such negligence, unless he has by his own negligence contributed to his injury. The jury are also instructed that the fact that the employee injured may have been guilty of contributory negligence shall not bar a recovery for his injury where his contributory negligence was slight, and that of the other employee was gross in comparison, but the damages in such case shall be diminished in proportion to the amount of negligence attributed to such injured employee."

(7) "The jury are instructed that if they find a verdict for the plaintiff, they should render a verdict in his favor for such sum (not exceeding the amount claimed in the declaration) as in their judgment will reasonably compensate him for the pain resulting from the injury and the loss of his foot; for the inconvenience to which he has been put and which he will be likely to be put during the remainder of his life in consequence of the loss of his foot; for the mental suffering past and future which the jury may find to be the natural and necessary consequence of the loss of his foot, and for such pecuniary loss, as the direct result of the injury, which the jury may find from the evidence that he is reasonably likely to sustain hereafter in consequence of his being deprived of one of his feet."

The defendant by its attorneys objected to the granting of each

of the said prayers and the Court sustained the objection as to the plaintiff's said prayers nos. 2, 3, 4 and 7 and rejected and refused to grant the same and granted and read to the jury the plaintiff's prayers no. 1, 5 and 6 and modified the plaintiff's prayers nos. 2 and 7 so as to read as follows.

(2) The jury are instructed that if they believe from the evidence that the trolley wheel would jump or fly off from the wire at the south end of the draw when the car was proceeding rapidly
52 and at a dangerous rate of speed when entering upon the draw, and that it was under all the circumstances of and facts surrounding the case and in evidence before you a negligent and imprudent act for the motorman to run said car at a rate of speed upon the draw and if you believe from the evidence that the train was run at a rapid and dangerous rate of speed by the motorman, Groves, upon and over said draw at the time of the accident to the plaintiff, which prevented the plaintiff from pulling down the trolley pole caused the trolley to fly off at the south end of the draw and jerk or throw the plaintiff off the car while he was in the proper discharge of his duties and that the said rate of speed was the proximate or direct cause of the accident and the injury to the plaintiff they may find a verdict for the plaintiff.

In determining the question of whether the rapid speed was the cause of the plaintiff's inability to pull down the said trolley pole you will consider all the testimony of both plaintiff and defendant as to the effect of the speed of the car or the facility with which the trolleyman could pull down said pole.

(7) The jury are instructed that if they find a verdict for the plaintiff, they should render a verdict in his favor for such sum (Not exceeding the amount claimed in the declaration) as in their judgment will reasonably compensate him for the pain resulting from his injury and the loss of his foot; for the inconvenience to which he has been put and which he will be likely to be put during the remainder of his life in consequence of the loss of his foot; for the mental suffering past and future which the jury may find to be the natural and necessary consequence of the loss of his foot, and for such pecuniary loss as the direct result of the injury which the jury may find from the evidence that he is reasonably likely to sustain hereafter in consequence of his being deprived of one of his feet.

That you can take into consideration with the previous instruction which I have given you, and that if you find that he was negligent, and the defendant's own agent was also negligent, then you should diminish the plaintiff's recovery in such proportion as his negligence bears to the negligence of the defendant company.

And as so modified granted said prayers nos. 2 and 7. To the action of the court in granting plaintiff's said prayers nos. 1, 5 and 6 and in modifying and granting as modified the plaintiff's prayers nos. 2 and 7, the defendant by its attorney excepted.

And thereupon the defendant by its attorney tendered to the Court its certain prayers numbered respectively 1 to 15 inclusive and

prayed that the same be granted and read to the jury, and said prayers are as follows.

(1) The jury are instructed to return a verdict in favor of the defendant (Refused)

(2) The Court instructs the jury that when negligence is relied upon as a cause of recovery, the burden is on the plaintiff to prove the negligence alleged in the declaration and that the injury com-
plained of was the direct and proximate result of the negli-
53 gence alleged. The evidence must show more than a mere probability of negligence. It is not sufficient that the evidence is consistent equally with the existence or non-existence of negligence, or with the fact that the injury did or did not result proximately from said negligence. There must be affirmative and preponderating proof both of the defendant's negligence, and of the fact that the injury complained of resulted proximately therefrom. (Granted)

(3) The Court instructs the Jury that in this case no presumption of negligence on the part of the defendant arises from the occurrence of the accident, but on the contrary the presumption is, in the absence of preponderating proof to the contrary, that the defendant has discharged all of its duties to the plaintiff. (Granted).

(4) The Jury are instructed that in order to establish negligence on the part of the defendant, it is incumbent upon the plaintiff to prove the essential fact or facts to be more consistent with negligence than with the absence of it, and if the evidence in the cause is equally consistent with the existence or non-existence of negligence on the part of the defendant, then the jury must find for the defendant. (Refused).

(5) The Court instructs the jury that a railway company is in no sense an insurer of the safety of its employees nor is it responsible for any injury to its employees except where it is proved to the satisfaction of the jury that the injury was the usual and the probable result of the negligent act of the railway company, alleged in the declaration; and its failure to use due care in discharging some duty which it owed its employees. Its whole duty is to use due and reasonable care and when this duty is performed the company is not responsible for any results however painful or calamitious they may be. (Granted)

(6) The Court instructs the jury that where injury results to an employee of the railway company from the neglect on the part of the company to observe some rule or regulation of the company itself, or some rule established or promulgated by authority of law, which has for its purpose the protection of the passengers of such company, or the public generally and not the protection of the employés, that then so far as such employé is concerned, there is no obligation upon said company to observe such rule and regulation, and its failure so to do cannot be relied upon as neglect of any duty owing by it to its employés or made the basis of a verdict against the defendant company. (Granted)

(7) The Court instructs the jury that they have no right to base a verdict in favor of the plaintiff, on conjectures, suppositions, possi-

bilities, speculations, presumptions or even probabilities. Clear, satisfactory and preponderating proof is essential on each material point. Unless the evidence is so clear, satisfactory and free from doubt as to enable the jury and each member thereof individually to say on their oaths that on each essential point it preponderates in favor of the plaintiff, then the plaintiff has failed to prove his case with that clearness required by the law of the land and it is the duty of the jury to return a verdict for the defendant, even though they may think the probabilities favor the plaintiff's contentions rather than those of the defendant. (Refused.)

54 (8) If the jury believe from the evidence that the defendant company or its employés were negligent in failing to comply with its own regulation to stop its car at the stop sign, before running on to the draw of the highway bridge, and that such regulation was adopted for the protection of the passengers and property of the defendant company from the dangers of an open draw and that it was also negligent in running its car on said bridge at an unusual rate of speed, and that the plaintiff knew these facts, or either of them, or in the exercise of due care should have known them, or either of them, and could with such knowledge by the exercise of due care and the means within his power have avoided the injury by pulling down his trolley pole, or by giving the motorman a signal to stop or otherwise, then it was his duty to do so without waiting for a stop or signals from the motorman, and his failure to do so would be gross negligence, and if it resulted in his injury, would be the proximate cause thereof and their verdict must be for the defendant. (Refused.)

(9) The Court instructs the jury that all negligence on the part of an employer or his employees, is not such negligence in the legal sense as will make the master responsible for the results thereof. Negligence in the legal sense is the neglect by one person of a duty which he owes to the person injured. If an employer owes a duty to one person, or to a class of persons to guard against a given danger, and does not owe that duty to another person or class of persons, and neglects to take proper precautions to protect the person to whom the duty was due in consequence whereof the person to whom the duty was due is not injured, but another person, to whom the duty was not due is injured, while in one sense this is negligence, it is not such negligence in the legal sense as would entitle the injured party to recover therefor; and in like manner, where an employer owes a duty to all persons to take precautions against a given danger, and fails to do so, and in consequence thereof, while no injury results to anyone from the particular danger against which there was a duty to guard, but injury results from some other danger as to which there was no duty to guard the person injured, this also is in one sense negligence, but it is not such negligence in the legal sense as makes the employer responsible for the results. Therefore if the jury believe from the evidence in this case that the defendant company employed the plaintiff to serve it as a trolleyman on its line of electric railway between Alexandria and Washington; that the trolley was a mechanical device liable to slip from its wire at

any time; that it employed and it was the duty of the plaintiff to watch said trolley pole and wire constantly, and at all times, in order to prevent its leaving its wire, and in event of its so leaving said wire, to restore it thereto as quickly as possible; that in order to perform this duty, it was his duty to be on his constant guard prepared at all times to perform these duties; and that he was liable to be called on to perform them whenever the necessity should occur, and at whatever speed his train was traveling, and without warning; that the point in his journey where a break in the continuity of the trolley wire was necessitated by the presence of the draw in
55 the high-way bridge, was a point where the trolley was peculiarly apt to jump the wire, and he had been warned of that fact; and if the jury further believe from the evidence that said point was also a point where it was proper for the defendant company to take special precautions to insure against its car running into an open draw or to protect from injury other persons or property properly using the said bridge and that pursuant to and in performance of this duty the defendant had adopted a regulation requiring all of its cars to come to a full stop about five hundred feet after getting on said bridge in sight of said draw, and at a point three hundred feet distant therefrom designated by a "stop" sign and that this rule was adopted for the purpose of preventing the passengers, employees and cars of said company from being precipitated into the river in event of the said draw being open at any time and that it had also adopted a speed regulation regulating the rate of speed on said draw and that said speed regulation was intended not as a protection to its employees in operating said cars or trolley, but to prevent injury to its overhead wires on said bridge, its trolley poles and wheels and cars occasioned or made more likely by a higher rate of speed or to prevent injury to its cars or appliances or the persons or property of others properly using said bridge by lessening the probability of accident from contact or collision on said bridge or draw, and that on the day in question, the motorman running said car omitted to make said safety stop, and without slackening his speed, ran past said stop sign and said break in said wire, in consequence whereof said trolley rope slipped from the grasp of and jerked the trolleyman so sharply that he, by reason thereof, lost his footing and fell from his car and was crushed, that then the defendant company is not legally responsible therefor, and their verdict must be for the defendant, and this is so even though the jury may believe from the evidence that at the time of said accident, the trolleyman, while he knew he was on said bridge, and that the motorman had not slackened its speed as *it* usually did before making said stop, did not know in fact that the stop sign had been passed, and was therefore not expecting the trolley to slip at the particular moment it did, and even though the jury may believe that if said car had made its customary stop at said stop sign, that the trolleyman might have been better prepared for the occasion, and that by reason thereof the injury received by him might have been avoided. (Refused.)

(10) The court instructs the jury that every person in entering the employment of another assumes the intrinsic risks of such employment. That by the term "intrinsic risks" is meant such risks as usually flow from or accompany such employment as it is usually conducted other than the risk of the negligence of fellow servants, or the failure of a master to exercise due care in furnishing a safe place to work or employing competent servants, and if the jury believe from the evidence that the *defendant* was injured by reason of any such risks or in some unknown or some unfor-seen way, then the verdict must be for the defendant. (Refused.)

(11) If the Jury believe from the evidence that the plaintiff was not thrown from his place on the defendant's car and injured at the south end of the draw of the bridge mentioned in the plaintiff's declaration, by reason of the manner in which said car passed onto the *saw* draw itself, as stated in the plaintiff's declaration, but that said Downey was injured at the north end of said draw, and as the car was passing from the said draw on to the north end of said bridge then their verdict must *must* be for the defendant even though they may believe that said car did not stop at the stop sign previous to entering on said draw pursuant to rule or that the said car ran thereon at a high and excessive rate of speed, or may believe it equally as probable that he was hurt in the one way as in the other or that he was injured in any other way, time or place than that mentioned in the declaration. (Granted.)

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(12) The Court instructs the jury that there is but one view of the evidence in this case which a verdict for the plaintiff can be returned and that is that the following facts are shown affirmatively by a preponderance of the evidence, to have existed at the time of the accident complained of.

(A) That the defendant company had previously promulgated to the knowledge of the plaintiff a rule prohibiting its cars from being driven on to the draw in the declaration mentioned at a speed exceeding 6 miles an hour.

(B) That said rule was both intended by the company and relied on by the plaintiff as a means of guarding the trolleyman from danger.

(C) That while the trolleyman was relying thereon the defendant's motorman carelessly and recklessly ran his car on to said draw at a dangerous rate of speed, before the plaintiff had notice of the fact or in the exercise of due care could have had notice of the fact that he was about to cross said draw.

(D) That in consequence thereof, the said plaintiff was thrown from the platform of said car and injured.

(E) At the time.

(F) At the place; and

(G) In the manner mentioned in the declaration.

The burden of proving each element is on the plaintiff. If the plaintiff fails to establish either of these essential facts by a preponderance of the evidence, then verdict must be for the defendant. (Granted as modified.)

(13) If the jury believe from the evidence that the plaintiff was injured in some other way or from some other cause than that stated in the plaintiff's declaration, or even while not so convinced they do not believe that the plaintiff has proved to them satisfactorily that he was injured in the manner and form alleged in his declaration they must find for the defendant, even though they may be convinced that some negligent act of the *plaintiff* or its employees caused or *contracted* to his injury. (Refused.)

(14) The Court instructs the jury that the provisions of the employers' liability law of June 11th, 1906, so far as the same are valid, do not *reply* to the employees of an electric railway company while actually engaged in transporting passengers between a point or points in any state to a point or points within the District
57 of Columbia, by means of trolley cars operated by electricity, and if the jury bel-eve from the evidence that at the time of the accident complained of in the plaintiff's declaration, the defendant company was such a company, so engaged, and that the plaintiff was employed by it in such transportation and was then so engaged and was injured by the negligence of a fellow servant likewise so employed and engaged, their verdict must be for the defendant. (Refused.)

(15) If the jury believe from the evidence that the defendant's car made its usual stop at the stop sign on the high-way bridge on November 29, 1910, and then proceeded even at a speed in excees of that provided in its rules and that said car passed safely on to said draw, with the plaintiff holding the trolley rope in his hand, and that thereafter the trolley escaped from the said trolleyman, either while he was attempting to adjust it to the trolley wire after getting on said draw, or, as the car was about to pass from the draw to the north end of the bridge, or otherwise, then their verdict must be for the defendant. (Refused.)

To the granting whereof and of each and every of them the plaintiff by his attorneys objected. The court granted the defendant's said prayers Nos. 2, 3, 5, 6, and 11 and refused and rejected the defendant's said prayers Nos. 1, 4, 7, 8, 9, 10, 13, 14 and 15, and modified the defendant's prayer No. 12 by inserting at the end of section C thereof, after the word "draw," the following words: or if there was no rule limiting the speed, if in spite of that the motorman ran the train on to the draw at a dangerous rate of speed, dangerous in reference to the ability of the trolleyman to perform his duties," and as so modified granted and read the same to the jury, and to the action of the Court in refusing to grant the said prayer as offered and in modifying the said prayer by the addition of the words aforesaid, and to the action of the Court in refusing to grant the said defendant's prayers Nos. 1, 4, 7, 8, 9, 10, 13, 14 and 15, the defendant by its attorneys excepted.

The Court thereupon charged the jury as follows:

"Gentlemen of the Jury, as you are aware, the plaintiff, Edward A. Downey, sues the defendant, the Washington, Alexandria and Mount Vernon Railroad Company for injuries received by him as a result of the alleged negligence of the defendant company, claiming

a sum not exceeding $15,000. The declaration, which is the statement of this case, contains two counts, the first charging the negligence of the company which consists in running the train at an excessive rate of speed over this draw of which you have heard so much. The second count varies from the first, in that it charges that the defendant company retained in its employ a motorman who had charge of the train, knowing that his reputation was that of a careless and reckless motorman, and that retaining him in the employment, with knowledge of that, or with grounds for believing that, the company was negligent, inasmuch as he ran the train at an excessive rate of speed on the draw.

"I presume from the attention you have given the case you understand exactly the physical situation upon which this accusation of negligence on the part of the company is based. According
58 to the evidence of both sides, the trains, when they go upon the bridge and approach the draw come to a stop at the "Stop Sign." There is a break in the trolley wire at the draw over which the wheel of the trolley pole runs, and through which the power is furnished, that break being necessitated by the fact of the draw in the bridge which swings open, and the draw could not swing if there was not this break in the wire; that this small interval of space between the two wires is covered by an apparatus which is intended to carry the trolley wheel across this break, but which, according to the testimony, operates with different success, so that they have on the rear of each motor car, or on the front of the trailer, the second car, a trolleyman whose duties are described as those of trolleyman. The trolleyman stands there with the rope in his hand for the purpose of keeping the trolley wheel on the wire when going across this bridge and on all parts of the line. That this trolley pole has a spring which forces it up against the wire with sufficient tension to carry it there ordinarily, but, as the evidence shows, it frequently, at different places on the line, jumps the wire and the trolleyman's duty is to pull that trolley down to prevent it from hitting the cross wires which prevail along the tracks in the country, or from hitting the bridge, as it did in this case.

"The plaintiff was a trolleyman, and on this night in question, November 29, 1907, was engaged in the performance of his duty as a trolleyman on the rear platform of the motor car, of which Mr. Groves was the motorman. As I say the allegation is that the speed of the car was so excessive as the result of carelessness of Mr. Grove, who was agent of the company, that when the trolleyman, Downey, got to the point where there was a break in the south side of the draw, the connection was missed, the trolley pole flew up, and he having held in some way to the rope was jerked off his feet and was thrown on the track and his leg injured as you have heard described. Now, that is the allegation on the part of the plaintiff as to the negligence of the company on which the plaintiff bases his right of recovery.

"The law in the case is somewhat complicated and I will have to detain you somewhat longer than usual, because the distinction is somewhat different, and I want you to get as clearly as possible an

understanding of the law. The facts should be found in accordance with the principles of law which I shall now state to you.

"The first question that arises is, what is the duty of the defendant railroad company to its employees? Something has been said about a change in the law by an act of Congress. That is a matter you need not concern yourselves with, because I shall give you the law as I now understand it, and it makes no difference what it was before as to this duty which the company owed to its employees, and it may be fairly stated in this way:

"That it is the duty of a railway company, acting through its agents and servants, to exercise ordinary care to prevent and avoid injury to its other employes while engaged in the discharge of their duty; and to that end it is the duty of the servants and employes of railway companies in charge of and operating trains and cars to exercise ordinary care to prevent and avoid injuring other
59 employes working or employed upon said cars, and the failure on the part of such railway company's employes in charge of the movements of such train or cars to exercise such ordinary care and prudence, is negligence.

"Now, in connection with that I will also state the law to be this:

"That a railway company is in no sense an insurer of the safety of its employés, nor is it responsible for any injury to its employees except where it is proved to the satisfaction of the jury that the injury was the usual and the probable result of the negligent act of the railway company, alleged in the declaration; and its failure to use due care in discharging some duty which it owed to its employees. Its whole duty is to use due and reasonable care and when this duty is performed the company is not responsible for any results however painful or calamitous they may be."

"In the natural course of an inquiry of this sort you will want to know upon whom rests the burden, or to put that the other way, the failure to exercise ordinary care on the part of the defendant. Upon whom is imposed the duty of proving the case, the law upon that point is:

"That when negligence is relied upon as a cause of recovery, the burden is on the plaintiff to prove the negligence alleged in the declaration, and that the injury complained of was the direct and proximate result of the negligence alleged. The evidence must show more than a mere probability of negligence. It is not sufficient that the evidence is consistent equally with the existence or non-existence of negligence, or with the fact that the injury did or did not result proximately from said negligence. There must be affirmative and preponderating proof both of the defendant's negligence, and of the fact that the injury complained of resulted proximately therefrom."

"And in this case no presumption of negligence on the part of the defendant arises from the occurrence of the accident, but as I have said already, in the absence of preponderating proof to the contrary, that the defendant has discharged all of his duties to the plaintiff. Putting that in more colloquial language, it simply means the mere fact that the plaintiff sustained injury on the de-

fendant's cars, raises no presumption of negligence on the part of the defendant. The burden is upon the plaintiff, not only to establish the negligence but that the negligence was the proximate cause of the injury itself."

"The jury are instructed that if they believe from the evidence that the trolley wheel would jump or fly off from the wire at the south end of the draw when the car was proceeding rapidly and at a dangerous rate of speed when entering upon the draw and that it was under all the circumstances and facts surrounding the case and in evidence before you a negligent and imprudent act for the motorman to run said car at a rapid rate of speed upon the draw, and if you believe from the evidence that the train was run at a rapid and dangerous rate of speed by the motorman, Groves, upon and over said draw at the time of the accident to the plaintiff, which speed prevented the plaintiff from pulling down the trolley
60 pole, caused the trolley to fly off at the south end of the draw and jerk or throw the plaintiff off the car while he was in the proper discharge of his duties, and that the said rate of speed was a proximate or direct cause of the accident and injury to the plaintiff, they may find a verdict for the plaintiff."

"I add to that: "In determining whether the rapid rate of speed was the cause of the plaintiff's inability to pull down the said trolley pole, you will consider all the testimony of both plaintiff and defendant as to the effect of the speed of the car on the facility with which said trolleyman could pull down said pole."

"In other words, you recall the testimony on both sides of the question as to the effect of the speed of the car upon the trolley leaving the wire. I would not attempt to go over it, it is very complicated, but you must consider that in connection with the question whether the speed of the car was the proximate cause of the trolley jumping the wire at the place where the wire was disconnected, at the south end of the draw. If it had nothing to do with the jumping of the trolley from the wire, why, then it is not the proximate cause of the accident. So you go back to see what is the effect, from the evidence, of the speed of the car upon the liability of the trolley to leave the wire at the south end of the draw."

"Now, I further instruct you "That you are the exclusive judges of the credibility of the witnesses and the weight to be given to the testimony and all questions of negligence by the defendants, and of contributory negligence of the plaintiff are to be determined by the jury."

"That in the District of Columbia, where an employee of a railway company, engaged in the discharge of his duties, is injured by the negligence of another employee or servant of the company also so engaged, the railway company shall be liable to the person injured for all damages which may result to him by reason of such negligence, unless he has by his own negligence contributed to his injury. The jury are also instructed that the facts that the employee injured may have been guilty of contributory negligence shall not bar a recovery for his injuries where his contributory negligence was light, and that of the other employee was gross in

comparison, but the damages in such case shall be diminished in proportion to the amount of negligenec attributed to such injured employee."

"In other words that is the law which I have referred to which changes the old law in regard to the liability of the company for injuries to the plaintiff caused by the negligence of a co-employee, and it is a fair statement of the existing law. So if you find that the plaintiff was negligent himself, which we call contributory negligence, and that negligence contributed to the accident, yet he would not be barred from recovery, but it would be your duty to adjust the amount of his negligence in proportion to the negligence of the employee who caused the accident and give your verdict, if you thought he was entitled to one, in relative proportion to those two degrees of negligence."

"That where injury results to an employee of the railway
61 company from the neglect on the part of the company to observe some rule or regulation of the company itself, or some rule established or promulgated by authority of law, which has for its purpose the protection of the passengers of such company, or the public generally and not the protection of the employees, that then so far as such employee is concerned, there is no obligation upon said company to observe such rule and regulation, and its failure so to do cannot be relied upon as neglect of any duty owing by it to its employees or made the basis of a verdict against the defendant company."

"I can explain that, I think, in more simple language. There is no dispute in the evidence that at a considerable distance south of the south end of the draw, there was what is termed a "Stop Sign," which obligated the motorman of the defendant company to stop as he approached the draw; that "Stop Sign" was about 307 or 308 feet from the draw. If you believe from the evidence that the purpose of that order was to protect the passengers who rode on that train, from being propelled into and upon the draw, in other words, the purpose was that the employees of the company should stop to ascertain whether the draw was open or not, for the purpose of protecting travelers upon the road, and for that purpose only, then the failure to stop could not be relied upon by the plaintiff in this case for recovery; provided, you believe there was a failure to stop as a basis for recovery, because the rule was not promulgated or adopted for his benefit; that is, if you believe it was not, but, if you believe that it was adopted for his benefit, then you have a right to rely upon it, and if the car failed to stop and he was injured by reason of the failure and it was the proximate cause of the failure to stop, then he would be entitled to recover. You can see the distinction. The evidence here is, there is a conclusion that this order was to stop; I leave it to you to say whether it was for the purpose of protecting the passengers only, or for the purpose of giving the trolleyman a chance to adjust himself to pull his trolley down when he came to the break in the draw. I am not discussing that, whether he did or did not stop; that is a disputed question of fact for you to determine and not for me to pass any opinion on."

"I further instruct you that "If you believe from the evidence that the plaintiff was not thrown from his place on the defendant's car and injured at the south end of the draw or the bridge mentioned in the plaintiff's declaration, by reason of the manner in which said car passed onto the said draw itself, as stated in the plaintiff's declaration, but that said Downey was injured at the north end of the said draw and as the car was passing from the said draw on to the north end of said bridge, then their verdict must be for the defendant, even though they may believe that said car did not stop at the stop sign previous to entering on said draw pursuant to rule or that the car ran thereon at a high and excessive rate of speed, or may believe it equally as probable that he was hurt in the one way as in the other, or that he was injured in any other way, time or place than that mentioned in the declaration."

"In other words, the rule of law is that the plaintiff must
62 state the facts which constitute the negligence of the defendant. This declaration states the negligence to have occurred from driving on to the draw from the south end and causing the trolley pole to fly up at that point. If you believe from the testimony that that was not the way the accident happened, that it happened some other way, then the plaintiff would not be entitled to recover, because he has not stated the facts as the accident subsequently developed.

"The Court instructs the jury that there is but one view of the evidence in this case upon which a verdict for the plaintiff can be returned and that is that the following facts are shown affirmatively by a preponderance of the evidence, to have existed at the time of the accident complained of:

(*a*) That the defendant company had previously promulgated to the knowledge of the plaintiff a rule prohibiting its cars from being driven on to the draw in the declaration mentioned at a speed exceeding six miles an hour.

(*b*) That said rule was both intended by the company and relied on by the plaintiff as a means of guarding the trolleyman from danger.

(*c*) That while the trolleyman was relying thereon the defendant's motorman carelessly and recklessly ran his car on to said draw at a dangerous rate of speed, before the plaintiff had notice of the fact or in the exercise of due care could have had notice of the fact that he was about to cross said draw or if there was no rule limiting the speed, if in spite of that, the motorman ran the train on to the draw at a dangerous rate of speed, dangerous in reference to the ability of the trolleyman to perform his duty.

(*d*) That in consequence thereof, the said plaintiff was thrown from the platform of said car and injured.

(*e*) At the time;

(*f*) At the place; and

(*g*) In the manner mentioned in the declaration.

The burden of proving each element is on the plaintiff. If the plaintiff fails to establish either of these essential facts by a preponderance of the evidence, then the verdict must be for the defendant."

"One more instruction on the measure of damages. "I instruct you that if you find a verdict for the plaintiff, you should render a verdict in his favor for such sum (not exceeding the amount claimed in the declaration) as in your judgment will reasonably compensate him for the pain resulting from the injury and the loss of his foot; for the inconvenience to which he has been put and which he will be likely to be put during the remainder of his life in consequence of the loss of his foot; for the mental suffering, past and future, which the jury may find to be the natural and necessary consequence of the loss of this foot, and for such pecuniary loss as the direct result of the injury which you may find from the evidence that he is reasonably likely to sustain hereafter in consequence of his being deprived of one of his feet." That you can take
63 into consideration with the previous instruction which I have given you, that if you find he was negligent, and the defendant's own agent was also negligent, then you should diminish the plaintiff's recovery in such proportion as his negligence bears to the negligence of the defendant company. You may take the case."

The defendant, by its counsel, then and there, before the jury retired, and in the presence of the jury, severally excepted to the following portions of the charge of the Court to the jury, to wit:

"According to the evidence of both sides, the trains, when they go upon the bridge and approach the draw, come to a stop at the stop sign. There is a break in the trolley wire at the draw over which the wheel of the trolley pole runs, and through which the power is furnished, that break being necessitated by the fact of the draw in the bridge which swings open, and the draw could not swing if there was not this break in the wire."

"In determining whether the rapid rate of speed was the cause of the plaintiff's inability to pull down the said trolley pole, you will consider all the testimony of both plaintiff and defendant as to the effect of the speed of the car on the facility with which said trolleyman could pull down said pole."

"There is no dispute in the evidence that at a considerable distance south of the south end of the draw, there is what is termed a "Stop Sign" which obligated the motorman of the defendant company to stop as he approached the draw; that "Stop Sign" was about 307 or 308 feet from the draw. If you believe from the evidence that the purpose of that order was to protect the passengers who rode on that train, from being propelled into and upon the draw, in other words, the purpose was that the employees of the said company should stop to ascertain whether the draw was open or not for the purpose of protecting travelers upon the road, and for that purpose only, then the failure to stop could not be relied upon by the plaintiff in this case for recovery; provided you believe there was a failure to stop, as a basis for recovery because the rule was not promulgated or adopted for his benefit; that is, if you believe it was not; but, if you believe that it was adopted for his benefit, then you have a right to rely upon it, and if the car failed to stop

and he was injured by reason of the failure, and it was the proximate cause of the failure to stop, then he would be entitled to recover. You can see the distinction. The evidence here is, there is a conclusion that this order was to stop; I leave it — you to say whether it was for the purpose of protecting the passengers only, or for the purpose of giving the trolleyman a chance to adjust himself to pull his trolley down when he came to the break in the draw. I am not discussing that, whether he did or did not stop; that is a disputed question of fact for you to determine and not for me to pass any opinion on."

The several exceptions of the defendant by its counsel to the foregoing portions of the charge of the Court to the jury were duly noted by the Court upon its minutes.

Whereupon the defendant by its counsel renewed its ob-
64 jections separately and severally to the granting by the Court of the plaintiff's prayers numbered 1, 2, 5, 6, and 7 and the refusal of the Court to grant defendant's prayers numbered 4, 7, 8, 9, 10, 13, 14, and 15, and the modification of defendant's prayer numbered 12, and to the refusal of the Court to grant said prayer as tendered, which objections being overruled by the Court, the defendant by its counsel, then and there noted their exception, which exception was duly noted by the Court upon its minutes.

Thereupon the jury retired and returned a verdict for the plaintiff for the sum of $5,000.00.

Be it remembered that each of the separate and several exceptions taken by counsel for defendant to the rulings of the Court as to the exclusion and admission of evidence and the rulings of the Court in admitting and refusing the instructions to the Jury, were taken by counsel for defendant, then and there, before the jury retired, separately and severally, and said exceptions were then and there separately and severally duly noted upon the minutes of the Justice presiding at the trial, and in order that the foregoing matters and things which would not otherwise appear of record may be made so to appear, and that it may be made known that the foregoing constitutes the substance of the evidence given in the course of the trial of this cause, counsel for the defendant, prays the Court to sign this bill of exceptions which has been settled by agreement of counsel for both parties, and the same is accordingly so signed and sealed by the Court and made a part of the record in this cause, this 30th day of August, A. D. 1912.

ASHLEY M. GOULD,
Associate Justice of the Supreme Court of the District of Columbia.

Assignment of Errors.

Filed September 9, 1912.

* * * * * * *

The Court erred as follows:

(1) In admitting in evidence order of defendant Company dated February 8, 1906, directing trains to stop at the "Stop Sign" on the Highway Bridge.

(2) In admitting in evidence, testimony as to the reputation of motorman Groves for carelessness and fast running.

(3) In admitting in evidence testimony as to negligence of motorman Groves in running past switches.

(4) In admitting in evidence testimony as to instructions concerning "Stop Sign" given the plaintiff by Joseph W. Dodd when the said Dodd was breaking plaintiff in.

(5) In admitting in evidence testimony of Harvey K. Shaner as to the speed that a car could get up between the "Stop Sign" and the Draw.

65 (6) In admitting in evidence testimony of plaintiff as to instructions given him while being broken in, concerning the crossing of the draw.

(7) In refusing to admit in evidence testimony of the stenographer at the former trial of this case that no witness was produced by the plaintiff to establish any regulation of the defendant Company governing speed of cars on the Bridge.

(8) In refusing to instruct the jury that upon the evidence of the plaintiff, its verdict should be for the defendant.

(9) In refusing to instruct the jury that upon the whole evidence, its verdict should be for the defendant.

(10) In granting plaintiff's prayers numbered One (1), five (5) and six (6) as offered and in granting plaintiff's prayers numbered two (2) and seven (7) as modified.

(11) In refusing to grant defendant's prayers numbered one (1), four (4), Seven (7), eight (8), nine (9), ten (10), thirteen (13), fourteen (14), and fifteen (15) and in refusing to grant defendant's prayer numbered twelve (12), and in modifying said prayer numbered twelve (12) and granting the same as modified.

(12) In charging the jury as follows:

"In determining whether the rapid rate of speed was the cause of the plaintiff's inability to pull down the said trolley pole, you will consider all the testimony of both plaintiff and defendant as to the effect of the speed of the car or the facility with which said trolleyman could pull down said trolley pole."

"The evidence here is, there is a conclusion that this order (referring to order of the defendant company to stop at the "Stop Sign") was to Stop; I leave it to you to say whether it was for the purpose of protecting the passengers only, or for the purpose of giving the trolleyman a chance to adjust himself to pull his trolley down when he came to the break in the draw."

JOHN S. BARBOUR,
D. S. MACKALL,
BASIL D. BOTELER,
Attorneys for Defendant.

Directions to Clerk for Preparation of Transcript of Record.

Filed September 9, 1912.

* * * * * * *

The Clerk, in preparing the transcript of record in the above entitled cause, will please embody the following viz:

(1) The Plaintiff's declaration.
(2) The Defendant's plea.
(3) The Plaintiff's joinder of issue.
(4) Memo. Verdict of Jury for Defendant.
(5) Plaintiff's motion for New Trial.
(6) Memo. Continuances of Plaintiff's motion for New Trial.
(7) Memo. Plaintiff's motion for New Trial granted and verdict set aside.
66 (8) Memo. Verdict of Jury for Plaintiff.
(9) Defendant's motion for New Trial.
(10) Memo. Continuances of Defendant's motion for New Trial.
(11) Memo. Defendant's motion for new trial overruled, judgment on verdict for plaintiff, appeal noted, and bond fixed.
(12) Memo. Bond filed.
(13) Memo. Bill of Exceptions submitted (May 10, 1912).
(14) Bill of Exceptions, notice & affidavit of service.
(15) Memo. Extensions of time to file record in Court of Appeals.
(16) Assignment of Errors.
(17) This designation.

JOHN S. BARBOUR,
D. S. MACKALL,
BASIL L. BOTELER,
Attorneys for Defendant.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 125, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 51165 at Law, wherein Edward A. Downey is Plaintiff and Washington, Alexandria and Mt. Vernon Railway Company, a corporation, is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 27th day of September, 1912.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2467. Washington, Alexandria and Mt. Vernon Railway Co., &c., appellant, vs. Edward A. Downey. Court of Appeals, District of Columbia. Filed Sep. 28, 1912. Henry W. Hodges, clerk.

67 MONDAY, February 3rd, A. D. 1913.

No. 2467.

WASHINGTON, ALEXANDRIA AND MT. VERNON RAILWAY COMPANY, a Corporation, Appellant,
vs.
EDWARD A. DOWNEY.

The argument in the above entitled cause was commenced by Mr. J. S. Barbour, attorney for the appellant, and was concluded by Mr. Edmund Burke, attorney for the appellee.

68 No. 2467.

WASHINGTON, ALEXANDRIA AND MT. VERNON RAILWAY COMPANY, a Corporation, Appellant,
vs.
EDWARD A. DOWNEY.

Opinion.

Mr. Justice ROBB delivered the opinion of the Court:

Appeal from a judgment of the Supreme Court of the District in a suit against the appellant for personal injuries sustained by the appellee while acting as a trolleyman on appellant's cars within the District of Columbia, November 29, 1907.

The evidence of the plaintiff tended to show that the defendant operates an electric railway and is a common carrier of passengers and freight within the District of Columbia, its double line of tracks extending across the highway bridge spanning the Potomac River and thence through Alexandria to Mt. Vernon, Va. Electric power is communicated to the motor cars in Virginia, and upon said highway bridge by a wire strung over the center of the track, the connection with the cars being made by the ordinary trolley-pole. One end of this pole is attached to the top of the car and a stiff spring tends to cause it to assume a perpendicular position. A rope is attached to the upper end of the pole and this is held by the trolleyman, who sees to it that the little wheel at the upper end of the trolley-pole is brought in contact with the overhead wire. The trolley-pole then assumes an angle probably of about forty-five degrees. At the time of the accident the defendant ran a train of two cars, and it was the duty of the trolleyman to stand between the two, either on the rear platform of the motor car or on the front platform of the trailer. His duties were to call stations, attend to passengers getting on or off, and to attend to the trolley. When not attending

to passengers it was his duty constantly to hold the trolley-rope. This was to prevent the trolley-pole from jumping the wire and also to enable the trolleyman to respond to the orders of the motorman or conductor. There is a draw in said bridge, which, of course, necessitates a break in the trolley wire at either end of the draw. This draw leaves a space of about four inches, and to aid in guiding the trolley wheel a metal plate is arranged in some way at the point of the break. About 300 feet from the draw there was suspended over the track a "stop" sign, and the following general order of the defendant was in force at the time of the accident: "Before crossing the draw, trains must come to a full stop at point indicated by a red board on which is the word 'stop.'" Trolleymen were instructed in accordance with this order. After cars had come to rest at the stop sign it was the trolleyman's duty to give the motorman a signal. The cars then proceeded slowly and the current was supposed to be shut off just before the draw was reached. It was then the trolleyman's duty to pull down the trolley-pole. If the train was proceeding more than six miles an hour, some of the witnesses put it even less, the trolley-pole wheel would not pass over the break at the draw; in other words, the trolley-pole would jump. There was also evidence tending to show that at the time of the accident it was a rule of the company to reduce the speed of a train to six miles an hour across the draw. Another rule of the company held conductors and motormen to equal responsibility for violation of the rule of the company governing the safety of trains, and requiring them to "take every precaution for the protection of their train, even if not provided for by the rules." Another rule required the trolleyman, when with the motor, to "obey the orders of the motorman respecting the proper performance of his duties."

The accident occurred between 10.30 and 11 o'clock on the night of November 29, 1907. "It was drizzling, snowlike, and the snow would come down and strike you in the face like mist or rain; that after he got on the bridge he got himself in position to wait until he made the stop; and that the train went past this draw and the trolley flew off and threw him down between the cars; that he had hold of the rope; had the rope in his hand; that the train did not make any stop at all, did not slow down any; that he was waiting for it to stop; that the train was going so fast and the spans passed him so quick he did not have any idea that they were approaching the draw."

At the close of plaintiff's evidence the defendant moved for an instructed verdict and the motion was repeated at the close of all the evidence, the principal grounds of the motion being the non-applicability of the Employers' Liability Law of 1906, and that the alleged negligence of the defendant was not the proximate cause of the accident.

(1) The suggestion that said act of 1906 (34 Stat., 232), is unconstitutional if it shall be held to apply to common carriers within the District of Columbia whose lines extend beyond the District, that is, who are also interstate carriers, is met by the decision
69 of this court in Hyde v. Southern R. Co., 31 App D. C., 466; and in El Paso & N. E. Ry. v. Gutierrez, 215 U. S., 87. In

each of those cases the common carrier was also an interstate carrier and the act in question was held constitutional so far as it applied to commerce within the District of Columbia and the territories. In this act Congress supposed it was also legislating with respect to carriers engaged in interstate commerce. This attempt having been declared to be abortive (Employers' Liability Cases, 207 U. S., 463), the act of April 22, 1908 (35 Stat., 65), was passed. This act deals with both classes of carriers, and was declared constitutional in Second Employers' Liability Cases, 223 U. S., 1.

(2) Assuming the validity of the act, it is insisted that it does not apply to the defendant because it is merely a carrier of passengers, the contention being that a carrier of passengers is not a common carrier within the meaning of said act. We might rest our decision upon the uncontradicted testimony in this case that the defendant is both a carrier of passengers and of freight; but, even though it be assumed to be merely a carrier of passengers, the result is the same, for, as was observed by the court in the Employers' Liability Cases, 207 U. S., 497, it is apparent from the first section of the act that it was intended to include every individual or corporation who might engage in interstate commerce as a common carrier. "Its all embracing words leave no room for any other conclusion. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, carriages trolley lines," etc. In defining commerce in the Second Employers' Liability Cases, the court said: "The term 'commerce' comprehends more than the mere interchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried by water or by land." See, also, Omaha & Council Bluffs Street Railway Co. v. Interstate Commerce Commission, 191 Fed., 40.

(3) It is specified as error that the court admitted in evidence said "stop" order, the contention being that this was for the safety of passengers and not for the protection of employees. It is difficult to perceive upon what reasonable theory it can be contended that this order was not for the protection of both passengers and employees. Both being upon the car they were in identically the same situation, and in promulgating this and other orders looking to the safety of its passengers and employees the company was doing no more than the law required. Northern Pac. R. v. Peterson, 162 U. S., 346, 353; Santa Fe Pac. R. v. Holmes, 202 U. S., 438,441. In the latter case it was said: "It is the duty of a railroad company to promulgate adequate rules and regulations for the safety of employees engaged in the dangerous duty of operating trains."

(4) We agree with the trial court that, under all the evidence, it was for the jury to say whether if they believed that the train was being run at an excessive rate of speed when it entered upon the draw, such excessive speed was the cause of the accident. The evidence showed conclusively that the trolley would not have jumped at this point had the train been run at a reasonable rate of speed, and there was evidence that the running of the train at an excessive

rate of speed was in direct violation of the orders of the defendant and the general instructions of its employees. But it is urged that the duty of the trolleyman required him to prevent the very thing that occurred; namely, the jumping of the trolley pole. We think it a sufficient answer to this contention to suggest that while it was the duty of the trolleyman to use all reasonable diligence in preventing such an occurrence, he was entitled in the performance of his duties in this regard to the assistance and protection of the regulations of the defendant. The jumping of the pole at some point where there was no break in the wire, an unexpected and perhaps unexplainable occurrence, might or might not have been attended with danger to him. The jumping of the pole at this particular point, where of course there was a break in the rails as well as in the wire, might have resulted much more seriously. There would of necessity be a jar of the train itself, and a break in the trolley wire and the presence of the metal plate might have produced much greater friction and shock than would have been present at some other point where there was neither a break in the wire nor in the rails. That these suggestions are not fanciful is clearly apparent from the testimony that one of the purposes of the stop before reaching the draw was to apprise the trolleyman of its proximity that he might pull down his trolley pole before entering upon it. And in determining whether the plaintiff was exercising due care at the time of the accident or, if not, whether his negligence was gross or slight, it was competent and proper for the jury to take into consideration all the circumstances disclosed by the evidence.

(5) There was evidence tending to show that the motorman upon the train in question was reputed to be a reckless or fast runner, and that this had been brought to the knowledge of the company. The admission of this evidence is assigned as error. In the second count of the declaration it is averred that this motorman had been in the defendant's employ for a long time, and that he was "negligent, unskilful, unfit, incompetent, and reckless as a motorman of cars, of which facts the defendant had notice and knowledge, and by the use of ordinary diligence" would have had such knowledge; and that notwithstanding such knowledge or means of knowledge on the part of the defendant, it retained him in its employ and entrusted to him the control of its cars. It is apparent, therefore, that had the court, as requested by the defendant, ruled that the Employers' Liability act was not applicable, evidence of the incompetency of said motorman, if brought home to the company, would have been very material. Hence, it was clearly admissible when offered. As no motion was subsequently made to strike out the evidence and no charge requested concerning it, its pertinency at the time the case was submitted to the jury, was not passed upon by the trial court, and there is therefore no foundation here for this assignment of error. Moreover, it is apparent from the prayers offered by the respective parties and the charge of the trial court, that this evidence was lost sight of when the liability act was held applicable.

The question then was not whether the motorman had there-
70 tofore been negligent, but whether he was negligent at the time of the accident.

(6) It is further assigned as error that the court refused to instruct the jury, as requested by the defendant, that if they should find a negligent failure to stop the cars at the "Stop" sign, before running on to the draw, as required by said stop order, and that said order "was adopted for the protection of the passengers and property of the defendant company from the dangers of an open draw and that it was also negligent in running its car on said bridge at an unusual rate of speed, and that the plaintiff knew these facts, or either of them, or in the exercise of due care should have known them, or either of them, and could with such knowledge by the exercise of due care and the means within his power have avoided the injury by pulling down his trolley-pole, or by giving the motorman a signal to stop or otherwise, then it was his duty to do so without waiting for a stop or signals from the motorman, and his failure to do so would be gross negligence, and if it resulted in his injury, would be the proximate cause thereof." This prayer is objectionable. It pre-supposes that the stop order was for the sole protection of passengers and property, while the testimony, as we have seen, was that one of the purposes of the stop at the stop sign was to enable the trolleyman to prepare to enter upon the draw. There was also evidence that the trolleyman was charged with no responsibility or control of the cars, and that had he attempted to exercise such responsibility or control it would have been the conductor's duty to have reported him to the company. All this, as previously suggested, had a distinct bearing upon the question whether he was in the exercise of due care at the time of the accident, and if not in the exercise of due care, whether his negligence was slight or gross. "When counsel, not content with a fair charge, resort to requests of exact nicety, they must abide to be judged by that same standard." Schmidt v. Vanderveer, 110 App. Div. (N. Y.), 758. The observation of the court in that case is applicable here. The trial court in the present case instructed the jury upon the question of contributory negligence and, if counsel desired further instruction upon that point, the prayer submitted should have been in harmony with the facts of the case.

This disposes of all the material assignments. Finding no error, we affirm the judgment, with costs, and it is so ordered.

Affirmed.

71 THURSDAY, March 6th, A. D. 1913.

No. 2467.

January Term 1913.

WASHINGTON, ALEXANDRIA AND MT. VERNON RAILWAY COMPANY, a Corporation, Appellant,
vs.
EDWARD A. DOWNEY.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause be, and the same is, hereby affirmed with costs.

Per Mr. JUSTICE ROBB,
March 6, 1913.

72 In the Court of Appeals of the District of Columbia.

No. 2467.

WASHINGTON, ALEXANDRIA AND MT. VERNON RAILWAY COMPANY, a Corporation, Appellant,
vs.
EDWARD A. DOWNEY, Appellee.

Now comes the appellant, the Washington, Alexandria and Mt. Vernon Railway Company, a Corporation, by its attorneys, and moves the Court to grant it a writ of error to remove the above entitled cause to the Supreme Court of the United States, and to stay the mandate of this Court until the termination thereof, and also to fix a bond for costs.

In support of this motion appellant avers that it has a right to said writ by virtue of Section 250 of the Judicial Code of the United States, for the reason that this cause involves the construction of that portion of an Act of Congress of June 11, 1906, (34 Stat. at L., 232, Chap. 3073, U. S. Comp. Stat. Supp. 1907, p. 891), commonly known as the "Employers' Liability Act," which was declared constitutional, the proper construction of said act having been drawn into question by appellant on pages 35, 49, 56 and 57 of the record.

JOHN S. BARBOUR,
D. S. MACKALL,
BASIL D. BOTELER,
Attorneys for Appellant.

(Endorsed:) No. 2467. Washington, Alexandria and Mt. Vernon Railway Company, a Corporation, Appellant, vs. Edward A. Downey, Appellee. Motion for Writ of Error, Stay of Mandate and Bond for Costs. Court of Appeals, District of Columbia. Filed Mar. 15, 1913. Henry W. Hodges, Clerk.

73 In the Court of Appeals of the District of Columbia.

No. 2467.

WASHINGTON, ALEXANDRIA AND MT. VERNON RAILWAY COMPANY, a Corporation, Appellant,
vs.
EDWARD A. DOWNEY, Appellee.

Upon Appellant's Motion for Writ of Error to Remove the Cause to the Supreme Court of the United States and for a Stay of Mandate.

Now comes the appellee by his attorneys and contests and opposes the said motion of the appellant and submits that the same should be overruled and dismissed for the following reasons:

1. Because the judgment of the Court below affirmed by this Court in this cause on appeal is not over the sum of Five thousand dollars ($5000.) and therefore, less than the amount necessary to give jurisdiction to the Supreme Court of the United States.

2. Because the questions raised in this cause on appeal and claimed to involve the construction of that portion of the Act of Congress of June 11, 1906, known as the "Employers' Liability Act" which has been declared constitutional as to the District of Columbia are clearly governed by prior decisions of the Supreme Court of the United States and the said Act declared to be applicable to "trolley lines". Employers' Liability Cases, 207 U. S. 497. The appellant's said motion for a writ of error and stay of mandate, if granted, could only subserve purposes of delay. Enc. Sup. Court Reps. Vol. 2, p. 309 under the title "The Rule of Precedents."

3. Because the appellant's said motion is based on a claim of construction of the constitutional portions of the said Act which has by the decisions and judgments of the Supreme Court of the United States been declared to be of local application only and not of general application throughout the United States and therefore the subject matter is not governed by Sec. 250 of the New Judicial Code, Act of March 3, 1911 ch. 231, authorizing writs of error from the Supreme Court of the United States to the Court of
74 Appeals of the District of Columbia. Am. Security Co. vs. Dist. of Columbia, 224 U. S. 491.

Wherefore the said appellee submits to the Court that the said motion should be denied and dismissed.

EDMUND BURKE,
LEO. P. HARLOW,
Appellee's Counsel.

(Endorsed:) In the Court of Appeals. No. 2467. Wash. etc. Ry. Co., Appellant, vs. Edward A. Downey, Appellee. Appellee's Objections to Motion for Writ of Error. Court of Appeals, District of Columbia. Filed Mar. 17, 1913. Henry W. Hodges, Clerk.

75 In the Court of Appeals of the District of Columbia.

No. 2467.

WASHINGTON, ALEXANDRIA AND MT. VERNON RAILWAY COMPANY, a Corporation, Appellant,
vs.
EDWARD A. DOWNEY, Appellee.

The cause of action arose in the District of Columbia. Appellant, a common carrier in the District and also between the District and the State of Virginia, raised the question of the applicability of the Employers' Liability Act of June 11, 1906, the contention being that the Act, to be constitutional, could apply only to local carriers and not to carriers doing both a local and interstate business. The ruling of the trial court was adverse to appellant and that ruling was sustained in this Court. A writ of error to the Supreme Court of the United States is now sought on the ground that the proper construction of said Act has been drawn in question.

In El Paso & N. E. Ry. vs. Gutierrez, 215 U. S. 87, the validity of said Act of 1906 was upheld so far as it related to the District of Columbia and the Territories. A reading of that decision discloses, we think, that its necessary effect was to include within the scope of said Act "every common carrier engaged in trade or commerce in the District of Columbia." Since the question raised by appellant was no longer an open one, the application for writ of error must be denied.

Writ denied.

CHAS. H. ROBB,
Associate Justice.

(Endorsed:) No. 2467. Washington, Alexandria and Mt. Vernon Railway Co., &c., Appellant, vs. Edward A. Downey. Opinion of the Court per Mr. Justice Robb on motion for writ of error. Court of Appeals, District of Columbia. Filed Mar. 20, 1913. Henry W. Hodges, Clerk.

76 THURSDAY, March 20th, A. D. 1913.

January Term, 1913.

No. 2467.

WASHINGTON, ALEXANDRIA AND MT. VERNON RAILWAY COMPANY, a Corporation, Appellant,
vs.
EDWARD A. DOWNEY.

On consideration of the motion for the allowance of a writ of error to remove the above entitled cause to the Supreme Court of the United States. It is by the Court this day ordered that said motion be, and the same is hereby denied.

Per Mr. JUSTICE ROBB,
March 20, 1913.

No. 2467.

WASHINGTON, ALEXANDRIA AND MT. VERNON RAILWAY COMPANY, a Corporation, Appellant,
vs.
EDWARD A. DOWNEY.

On motion, It is by the Court this day ordered that the mandate in the above entitled cause be, and the same is hereby, stayed until further order.

77 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals, before you, or some of you, between Washington, Alexandria & Mt. Vernon Railway Company (a corporation), appellant, and Edward A. Downey, appellee, a manifest error hath happened, to the great damage of the said appellant, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 3d day of April, in the year of our Lord one thousand nine hundred and thirteen.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed to operate as a supersedeas on a bond of Ten Thousand Dollars which I have this day approved.

EDWARD D. WHITE,
Chief Justice of the United States.

78 (*Bond on Writ of Error.*)

Know all Men by these Presents, That we, Washington, Alexandria & Mt. Vernon Railway Company (a corporation), as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Edward A. Downey in the full and just sum of Ten thousand dollars to be paid to the said Edward A. Downey, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 2nd day of April, in the year of our Lord one thousand nine hundred and thirteen.

Whereas, lately at a term of the Court of Appeals of the District of Columbia, in a suit depending in said Court, between Washington, Alexandria & Mt. Vernon Railway Company (a corporation), appellant, and Edward A. Downey, appellee a judgment was rendered against the said appellant and the said appellant having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Edward A. Downey citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, That if the said Washington, Alexandria & Mt. Vernon Railway Company (a corporation), shall prosecute said writ to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

WASHINGTON, ALEXANDRIA & MT. VERNON RY. CO., [SEAL.]
By FREDERICK H. TREAT, [SEAL.]
President.

Attest:

GARDNER L. BOOTH, [SEAL.]
Secretary.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, [SEAL.]
By THOS. J. DE LASHMUTT, [SEAL.]
Attorney-in-Fact.

[Seal of Washington, Alexandria & Mt. Vernon Ry. Co.]
[Seal of Fidelity and Deposit Company of Maryland.]
[Seal of Washington Utilities Company.]

Sealed and delivered in the presence of—

H. WHEAT.
G. M. BROOKE.

Approved by—

EDWARD D. WHITE,
Chief Justice of the United States.

[Endorsed:] No. 2467. Washington, Alexandria and Mt. Vernon Railway Co., Appellant, vs. Edward A. Downey. Supersedeas Bond on Writ of Error. Court of Appeals, District of Columbia. Filed Ap'l 4, 1913. Henry W. Hodges, Clerk.

79 UNITED STATES OF AMERICA, *ss:*

To Edward A. Downey, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Washington, Alexandria & Mt. Vernon Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 3d day of April, in the year of our Lord one thousand nine hundred and thirteen.

EDWARD D. WHITE,
Chief Justice of the United States.

Service accepted this 4th day of April *4*, 1913.

LEO P. HARLOW,
Att'y for Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Apr. 4, 1913. Henry W. Hodges, Clerk.

80 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 79 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Washington, Alexandria and Mt. Vernon Railway Company, a Corporation, Appellant, vs. Edward A. Downey, No. 2467, January Term, 1913, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 4th day of April A. D. 1913.

[Seal Court of Appeals, District of Columbia. 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 23,631. District of Columbia Court of Appeals. Term No. 144. Washington, Alexandria & Mt. Vernon Railway Company, plaintiff in error, vs. Edward A. Downey. Filed April 11th, 1913. File No. 23,631.

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not be used for the transportation of any cars other than those used for the transportation of passengers on street railways."

On November 29 the defendant in error, the plaintiff below, was in the employ of the plaintiff in error in the capacity of a trolleyman on a *purely* passenger train consisting of two cars, a motor car and a trailer, operating between Alexandria, Virginia, and the Company's terminal at 12th street and Pennsylvania avenue in the city of Washington. The motive power was electricity. The tracks extended from Virginia across the Highway Bridge spanning the Potomac River, thence through Potomac Park to the 12th street terminus. The electric power was communicated to the motor cars by an overhead trolley wire strung over the center of each track. Connection with the cars was made by an ordinary trolley pole with a wheel at the end of the pole, so grooved as to engage the trolley wire. One end of this pole was attached to the top of the motor car and a stiff spring caused it to maintain a perpendicular position when not in contact with the trolley wire. A rope was attached to the upper end of this pole near the trolley wheel. This rope enabled the trolleyman to pull the pole down sufficiently to enable the grooved wheel to engage the trolley wire and thereafter was held by the trolleyman constantly while the car was in motion to enable him to perform his chief duty, which was to see that the trolley wheel was kept in contact with the overhead wire and did not escape therefrom. The trolley pole, when in contact with the wire, assumes an angle of approximately 45 degrees. It is the duty of the trolleyman while the train is in motion to stand constantly between the two cars, either on the rear platform of the motor car or on the front platform of the trailer, and to constantly hold the trolley rope in his hands, so as to *immediately* prevent the trolley pole from rising to

a perpendicular position and thereby coming in contact with the stay wires and other overhead work which suspend the trolley wire in its proper position should it jump from the wire, *a thing it is liable to do at any time and without warning.*

There was a draw in the bridge which necessitated a break in the trolley wire at each end of the draw. This left a gap in the trolley wire of several inches at this point. To aid in guiding the trolley wheel across this break metal "pans" with flanges on each side are arranged at the point of the break so as to cover this space and make it more likely that the trolley wheel will pass over the break and re-engage the trolley wire after so doing without flying up and coming in contact with the stay wires and overhead work of the bridge.

When the trolley wheel escapes contact with the wire there is immediate danger of great damage to the overhead system from the consequent rupture of stay wires as well as of injury to the car and passengers resulting from the entanglement of the wheel and pole with these wires. This is liable to happen at any time or place.

About 300 feet before reaching the draw there was suspended over the track a sign with the word "stop," and the following general order in respect thereto was in force at the time of the accident:

> "Before crossing the draw, trains must come to a full stop at a point indicated by a red board on which is the word 'stop.'"

The evident purpose of this sign was to avoid the risk of the car being propelled into the river should the draw happen to be open at any time.

After this stop was made it was the duty of the trolleyman, after assuring himself that no passenger was getting on or off the car, to give the motorman a signal to proceed by means of a bell cord. The car then proceeded

towards the draw and was supposed by the time it reached there to get up sufficient momentum to take it across the break, as the pole was lowered by the trolleyman and the current thereby shut off as the draw was reached. If in passing on or from the draw the wheel escaped contact with the wire it was the trolleyman's duty to hold down the trolley pole and to readjust it just as he would do under similar circumstances at any other point on the line. He did the same thing when the car was about to pass from the draw. No signal was required to be given by the motorman either that the car was about to pass on to the draw or was about to pass off of it.

Between 10:30 and 11 o'clock on the night of November 29, 1907, while it was drizzling and spitting snow, as the plaintiff below testified, after his train got on the bridge he got himself in position to wait until the stop was made; that instead of the stop being made the train went past it and on towards the draw; that though he had his hand on the trolley rope, the trolley pole flew up and jerked him so that he lost his footing and fell between the cars; that he was expecting it to stop; that the train was going so fast and the spans passed him so quick that he did not have any idea that they were approaching the draw. The foot of the plaintiff was badly crushed.

He sued the defendant, the plaintiff in error, in the Supreme Court of the District for his injuries upon the theory that they were the result of negligence on the part of the motorman, his fellow servant, in failing to stop at the stop sign and in passing from the south end of the bridge to the south end of the draw at an unusually high rate of speed; and that under the Employers' Liability Act of 1906 the company was liable for the result of this negligence on the part of a fellow servant.

The contentions of the defendant were:

1. That the Employers' Liability Act of 1906 was not applicable to the case made.

(i) Because that Act having the unconstitutional provisions stricken from it did not apply to a carrier engaged in commerce *between* the State of Virginia and the District of Columbia.

(ii) Because the defendant Company, the plaintiff in error, was not a common carrier within the meaning of that statute.

2. That the stop required before going on the draw was not intended to warn the trolleyman of the proximity of the draw to enable him to pull down the trolley pole; that the escape of the trolley wheel from the trolley wire was liable to happen at any time and at any place on the line, and did frequently happen at any point on the line without regard to the rate of speed at which the trolley cars were traveling; that, therefore, even if the motorman was negligent in failing to stop at the stop sign, such negligence was not the proximate cause of the plaintiff's injury, because it was the duty of the plaintiff to be ready at *every instant of time while the wheels of his car were in motion* to *immediately* arrest the upward tendency of the trolley pole should it escape contact with the trolley wire; and in like manner that the speed of the train on the bridge could not be regarded as the proximate cause of the injury so long as this speed did not exceed the usual speed in running through the country.

3. That the motorman was guilty of no negligence; did make the stop at the stop sign and thereafter started his car on signal from the trolleyman and proceeded at the usual rate of speed to cross the draw, and through his own neglect and lack of attention to his duties the plaintiff permitted the trolley pole to escape from that

constant control which it was his duty to maintain over it, in consequence of which he lost his footing.

4. That the risk of being thus jerked from his feet at any point, whether on the draw or elsewhere, was a risk incident to his employment and was assumed by him when entering the employment and that this assumption was not done away with by the Employers' Liability Act of 1906.

5. That the trial court erred in permitting evidence of the existence of the stop sign rule as well as evidence tending to show that it had not been observed by the motorman to be submitted to the jury for the purpose of showing negligence, as well as in admitting evidence of the reputation of the defendant as reckless motorman.

The evidence was conflicting as to whether or not the car stopped at the stop sign; the speed at which it crossed, and as to whether or not the accident happened at the south end of the draw or not.

The first and fourth contentions involve the construction of Federal Employers' Liability Act of 1906.

After the evidence was concluded the court at the instance of the plaintiff gave certain instructions over the objection of the defendant and also refused various other instructions requested by the defendant; all to the prejudice of the defendant, the plaintiff in error, involving the construction of the Employers' Liability Act of 1906, as well as other material questions.

The court below overruled all of the contentions of the plaintiff in error herein mentioned with the result that a verdict was returned in favor of the plaintiff below for $5,000 and a judgment was entered thereon. On appeal the Court of Appeals of the District of Columbia affirmed the action of the trial court in all particulars. (Washington, &c., R. Co. vs. Downey, 40 App D. C., 147.)

This case is brought to this court by writ of error upon the ground that the judgment appealed from involves the construction of the Employers' Liability Act of 1906 as above stated:

(a) In holding that the Act did apply to a carrier engaged in commerce between the District of Columbia and the State of Virginia;

(b) In holding that the defendant company, the plaintiff in error, was a common carrier within the meaning of that act; and

(c) That under that Act the plaintiff below did not assume the risks incident to his employment.

Various other errors are assigned, however.

ASSIGNMENTS OF ERROR.

It is respectfully submitted that the court erred:

1st. In permitting the following rule of the company to be read in evidence before the jury:

> "February 8, 1906. General Notice. Before crossing the draw, trains must come to a full stop at point indicated by a red board on which is the word 'Stop.' (Signed) J. Colvin, Superintendent." (Tr. p. 12.)

2d. In admitting the following testimony as to the reputation of the plaintiff's motorman, Groves:

> "Q. Do you know what the reputation of Mr. Groves as a motorman was among those employees? A. Yes, sir; I knew it. I worked with him. Q. It is not your own personal experience but what the others thought of him? A. Yes, sir; I have heard *several* of them say they would not work with him. Q. Will you state what this man's reputation was generally among the em-

ployees of the road? A. He was reckless and a lot of fellows were afraid to work for him. I was myself." (Testimony of Joseph G. Harris, Tr. p. 14.)

Also the following testimony of George S. Whedbee:

"Q. What, if anything, do you know with respect to his negligence in running past switches? A. Very frequently he approached the switches over the speed the company required, and it was my duty to report it to the foreman, which I did several times. I reported the condition in which he ran over the switches at 14th and B streets; reported it to Mr. Green, foreman of underground system, over switchmen and over pitmen. Q. Was that before Mr. Downey was hurt? A. Well, before that he was a new motorman and they gave us green lights and they hired the new motormen and told us to hold the green lights up going around the curve there, and I gave him a signal and he never paid any attention to it; he ought to have approached us about 4 miles an hour going around the curve, and lots of times he never noticed it." (Tr. p. 22.)

On cross-examination this witness stated further:

"That Mr. Green had no authority to employ or discharge men, as far as he knew; he, Green, was foreman of the underground system in the District and foreman over switchmen and pitmen; he never made any report to any other officer or representative of the road, and that he reported Groves to the foreman two or three times for running past his signal across 14th and B streets switch at 12 or 15 miles an hour, when

regulation prescribed 4 or 6 miles an hour. The switch was at the bottom of a steep hill, where there is a curve, and was several times out of order, so there had to be a green light there, or caution signal." (Tr. p. 23.)

Also in admitting testimony of Wm. C. Litchford on the same point, as follows:

> "Q. State whether or not you have heard the reputation of Mr. Groves, as a motorman, as regard to his running cars, discussed by other men on the road? A. Yes, sir. Q. Now, state what the reputation was. Witness answered that Groves was noted to be a fast runner." (Tr. p. 25.)

This evidence is inadmissible, 1st, because it was not sufficient to establish general reputation, and 2d, because there was no evidence showing that this reputation, if established, was ever communicated to the Company, and 3d, because evidence of general reputation is incompetent where the employer is responsible for the acts of the fellow servant. (Jones on Evidence, Sec. 148; Porter vs. Seiler, 23 Pa., 424; 62 Am. Dec., 341, 344; Note to O'Bryon vs. O'Bryan, 13 Mo., 16; 53 Am. Dec., 133.)

3d. The court erred in refusing to give the first instruction prayed by the defendant below in the following words:

> "(1) The jury are instructed to return a verdict in favor of the defendant."

4th. The court erred in granting the first instruction prayed on behalf of the plaintiff in the following words:

> "(1) You are instructed that it is the duty of a railway company, acting through its agents and

servants, to exercise ordinary care to prevent and avoid injury to its other employees while engaged in the discharge of their duty; and to that end it is the duty of the servants and employees of railway companies in charge of and operating trains and cars to exercise ordinary care to prevent and avoid injuring other employees working or employed upon said cars, and the failure on the part of such railway company's employees in charge of the movements of such trains or cars to exercise such ordinary care and prudence is negligence." (Tr. p. 51.)

5th. The court erred in approving the action of the lower court in granting as modified the second instruction prayed for by the plaintiff below, the defendant in error, as follows:

"(2) The jury are instructed that if they believe from the evidence that the trolley wheel would jump or fly off from the wire at the south end of the draw when the car was proceeding rapidly and at a dangerous rate of speed when entering upon the draw, and that it was under all the circumstances of and facts surrounding the case, and in evidence before you, a negligent and imprudent act for the motorman to run said car at a rate of speed upon the draw, and if you believe from the evidence that the train was run at a rapid and dangerous rate of speed by the motorman, Groves, upon and over said draw at the time of the accident to the plaintiff, which prevented the plaintiff from pulling down the trolley pole, caused the trolley to fly off at the south end of the draw and jerk or throw the plaintiff off the car while he was in the proper

discharge of his duties, and that the said rate of speed was the proximate or direct cause of the accident and the injury to the plaintiff, they may find a verdict for the plaintiff. In determining the question of whether the rapid speed was the cause of the plaintiff's 'inability' to pull down the said trolley pole, you will consider all the testimony of both plaintiff and defendant as to the effect of the speed of the car or the facility with which the trolleyman could pull down said pole." (Tr. p. 53.)

6th. The court erred in approving the action of the trial court in granting the fifth prayer asked by the plaintiff, as follows:

"(5) The jury are the exclusive judges of the credibility of the witnesses and the weight to be given to the testimony, and of all questions of negligence by the defendant and of contributory negligence of the plaintiff are to be determined by the jury." (Tr. p. 52.)

7th. The court erred in approving the sixth prayer granted by the trial court at the instance of the plaintiff, as follows:

"(6) The jury are instructed that in the District of Columbia where an employee of a railway company, engaged in the discharge of his duties, is injured by the negligence of another employee or servant of the company also so engaged, the railway company shall be liable to the person injured for all damages which may result to him by reason of such negligence, unless he has by his own negligence contributed to his injury. The jury are also instructed that the

fact that the employee injured may have been guilty of contributory negligence, shall not bar a recovery for his injury where his contributory negligence was slight, and that of the other employee was gross in comparison, but the damages in such case shall be diminished in proportion to the amount of negligence attributed to such injured employee." (Tr. p. 52.)

8th. The court erred in approving the action of the trial court in granting at the instance of the plaintiff below the seventh instruction, as amended, which reads as follows:

"(7) The jury are instructed that if they find a verdict for the plaintiff, they should render a verdict in his favor for such sum (not exceeding the amount claimed in the declaration) as in their judgment will reasonably compensate him for the pain resulting from his injury and the loss of his foot; for the inconvenience to which he has been put and which he will be likely to be put during the remainder of his life in consequence of the loss of his foot; for the mental suffering, past and future, which the jury may find to be the natural and necessary consequence of the loss of his foot, and for such pecuniary loss as the direct result of the injury which the jury may find from the evidence that he is reasonably likely to sustain hereafter in consequence of his being deprived of one of his feet. That you can take into consideration with the previous instruction which I have given you, and that if you find that he was negligent, and the defendant's own agent was also negligent, then you should diminish the plaintiff's recovery in such proportion as his neg-

ligence bears to the negligence of the defendant company." (Tr. p. 53.)

9th. The court erred in approving the action of the lower court in refusing the eighth prayer asked on behalf of the defendant, as follows:

> "(8) If the jury believe from the evidence that the defendant company or its employees were negligent in failing to comply with its own regulation to stop its car at the stop sign, before running on to the draw of the highway bridge, and that such regulation was adopted for the protection of the passengers and property of the defendant company from the dangers of an open draw and that it was also negligent in running its car on said bridge at an unusual rate of speed, and that the plaintiff knew these facts, or either of them, or in the exercise of due care should have known them, or either of them, and could with such knowledge, by the exercise of due care and the means within his power, have avoided the injury by pulling down his trolley pole, or by giving the motorman a signal to stop or otherwise, then it was his duty to do so without waiting for a stop or signals from the motorman, and his failure to do so would be gross negligence, and if it resulted in his injury, would be the proximate cause thereof and their verdict must be for the defendant." (Tr. p. 55.)

10th. The court erred in approving the action of the trial court in refusing the ninth prayer asked by the defendant below, which reads as follows:

> "(9) The Court instructs the jury that all negligence on the part of an employer or his em-

ployees, is not such negligence in the legal sense as will make the master responsible for the results thereof. Negligence in the legal sense is the neglect by one person of a duty which he owes to the person injured. If an employer owes a duty to one person, or to a class of persons to guard against a given danger, and does not owe that duty to another person or class of persons, and neglects to take proper precautions to protect the person to whom the duty was due, in consequence whereof the person to whom the duty was due is not injured, but another person, to whom the duty was not due is injured, while in one sense this is negligence, it is not such negligence in the legal sense as would entitle the injured party to recover therefor; and in like manner, where an employer owes a duty to all persons to take precautions against a given danger, and fails to do so, and in consequence thereof, while no injury results to anyone from the particular danger against which there was a duty to guard, but injury results from some other danger as to which there was no duty to guard the person injured, this also is in one sense negligence, but it is not such negligence in the legal sense as makes the employer responsible for the results. Therefore, if the jury believe from the evidence in this case that the defendant company employed the plaintiff to serve it as a trolleyman on its line of electric railway between Alexandria and Washington; that the trolley was a mechanical device liable to slip from its wire at any time; that it employed and it was the duty of the plaintiff to watch said trolley pole and wire constantly, and at all times, in order to prevent its leaving its wire, and in event of its so leaving said wire, to

restore it thereto as quickly as possible; that in order to perform this duty, it was his duty to be on his constant guard, prepared at all times to perform these duties; and that he was liable to be called on to perform them whenever the necessity should occur, and at whatever speed his train was traveling, and without warning; that the point in his journey where a break in the continuity of the trolley wire was necessitated by the presence of the draw in the highway bridge, was a point where the trolley was peculiarly apt to jump the wire, and he had been warned of that fact; and if the jury further believe from the evidence that said point was also a point where it was proper for the defendant company to take special precautions to insure against its car running into an open draw or to protect from injury other persons or property, properly using the said bridge, and that pursuant to and in performance of this duty the defendant had adopted a regulation requiring all of its cars to come to a full stop about five hundred feet after getting on said bridge in sight of said draw, and at a point three hundred feet distant therefrom designated by a 'stop' sign and that this rule was adopted for the purpose of preventing the passengers, employees and cars of said company from being precipitated into the river in event of the said draw being open at any time, and that it had also adopted a speed regulation regulating the rate of speed on said draw, and that said speed regulation was intended not as a protection to its employees in operating said cars or trolley, but to prevent injury to its overhead wires on said bridge, its trolley poles and wheels and cars occasioned or made more likely

by a higher rate of speed, or to prevent injury to its cars or appliances or the persons or property of others, properly using said bridge, by lessening the probability of accident from contact or collision on said bridge or draw, and that on the day in question, the motorman running said car omitted to make said safety stop, and without slackening his speed, ran past said stop sign and said break in said wire, in consequence whereof said trolley rope slipped from the grasp of and jerked the trolleyman so sharply that he, by reason thereof, lost his footing and fell from his car and was crushed, that then the defendant company is not legally responsible therefor, and their verdict must be for the defendant, and this is so even though the jury may believe from the evidence that at the time of said accident, the trolleyman, while he knew he was on said bridge, and that the motorman had not slackened its speed as *it* usually did before making said stop, did not know in fact that the stop sign had been passed, and was therefore not expecting the trolley to slip at the particular moment it did, and even though the jury may believe that if said car had made its customary stop at said stop sign, that the trolleyman might have been better prepared for the occasion, and that by reason thereof the injury received by him might have been avoided." (Tr. pp. 55-56.)

11th. The court erred further in refusing the tenth prayer asked by the defendant below, as follows:

"(10) The court instructs the jury that every person in entering the employment of another assumes the intrinsic risks of such employment.

That by the term 'intrinsic risks' is meant such risks as usually flow from or accompany such employment, as it is usually conducted other than the risk of the negligence of fellow servants, or the failure of a master to exercise due care in furnishing a safe place to work or employing competent servants, and if the jury believe from the evidence that the plaintiff (then defendant) was injured by reason of any such risks or in some unknown or some unforeseen way, then the verdict must be for the defendant." (Tr. p. 57.)

12th. The court erred in approving the action of the trial court in refusing the thirteenth prayer offered by the defendant, as follows:

"(13) If the jury believe from the evidence that the plaintiff was injured in some other way or from some other cause than that stated in the plaintiff's declaration, or even while not so convinced they do not believe that the plaintiff has proved to them satisfactorily that he was injured in the manner and form alleged in his declaration they must find for the defendant, even though they may be convinced that some negligent act of the defendant or its employees caused or contributed (contracted) to his injury." (Tr. p. 58.)

13th. The court further erred in approving the action of the lower court in refusing the fourteenth instruction asked on behalf of the defendant and which reads as follows:

"(14) The court instructs the jury that the provisions of the Employers' Liability Law of June 11, 1906, so far as the same are valid, do not

apply to the employees of an electric railway company while actually engaged in transporting passengers between a point or points in any State to a point or points within the District of Columbia, by means of trolley cars operated by electricity, and if the jury believe from the evidence that at the time of the accident complained of in the plaintiff's declaration, the defendant company was such a company, so engaged, and that the plaintiff was employed by it in such transportation and was then so engaged and was injured by the negligence of a fellow servant likewise so employed and engaged, their verdict must be for the defendant." (Tr. p. 58.)

14th. The court further erred in approving the action of the trial court in refusing the fifteenth prayer asked on behalf of the defendant, which reads as follows:

"(15) If the jury believe from the evidence that the defendant's car made its usual stop at the stop sign on the Highway Bridge on November 29, 1907, and then proceeded, even at a speed in excess of that provided in its rules, and that said car passed safely on to said draw, with the plaintiff holding the trolley rope in his hand, and that thereafter the trolley escaped from the said trolleyman, either while he was attempting to adjust it to the trolley wire after getting on said draw, or, as the car was about to pass from the draw to the north end of the bridge, or otherwise, then their verdict must be for the defendant." (Tr. p. 58.)

15th. The court further erred in approving the action of the trial court in further charging the jury orally, as follows:

"There is no dispute in the evidence that at a considerable distance south of the south end of the draw, there is what is termed a 'Stop Sign' which obligated the motorman of the defendant company to stop as he approached the draw; that 'Stop Sign' was about 307 or 308 feet from the draw. If you believe from the evidence that the purpose of that order was to protect the passengers who rode on that train from being propelled into an open draw, in other words, the purpose was that the employees of the said company should stop to ascertain whether the draw was open or not for the purpose of protecting travelers upon the road, and for that purpose only, then the failure to stop could not be relied upon by the plaintiff in this case for recovery; provided you believe there was a failure to stop, as a basis for recovery because the rule was not promulgated or adopted for his benefit; that is, if you believe it was not; but, if you believe that it was adopted for his benefit, then you have a right to rely upon it, and if the car failed to stop and he was injured by reason of the failure, and it was the proximate cause *of the failure to stop*, then he would be entitled to recover. You can see the distinction. The evidence here is, there is a conclusion that this order was to stop; I leave it to you to say whether it was for the purpose of protecting the passengers only, or for the purpose of giving the trolleyman a chance to adjust himself to pull his trolley down when he came to the break in the draw. I am not discussing that, whether he did or did not stop; that is a disputed question of fact for you to determine and not for me to pass any opinion on." (Tr. pp. 65-6.)

ARGUMENT.

I. THE ERRORS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The 3d, 4th, 5th, 6th, 7th, 8th, 9th, 11th and 13th assignments of error involved the construction of the Employers' Liability Act of 1906 and will first be discussed.

THE EMPLOYERS' LIABILITY ACT OF 1906.

1. THE ACT OF 1906 IN SO FAR AS IT HAS BEEN DECLARED CONSTITUTIONAL DOES NOT APPLY TO ANY COMMON CARRIER ENGAGED IN COMMERCE BETWEEN THE DISTRICT OF COLUMBIA AND THE STATE OF VIRGINIA.

The application of the Employers' Liability Act of 1906 to the case proven is essential to sustain the action of the trial court and the Court of Appeals in refusing the first instruction asked on behalf of the plaintiff, to wit: "The jury are instructed to return a verdict in favor of the defendant" because it is uncontradicted that at the very time of this accident the defendant was engaged in the transportation of passengers from Alexandria, in the State of Virginia, to Washington, in the District of Columbia, and at the moment of the accident the train upon which the plaintiff was employed was in the act of crossing the Potomac River, the boundary line between the District of Columbia and the State of Virginia. (Tr. p. 54, Third Assignment of Error.)

The application of the act likewise is necessary in order to sustain the action of the trial court in granting the 1st (Tr. p. 51), 2d (Tr. p. 53), 5th (Tr. p. 52), 6th (Tr. p. 52), and 7th (Tr. p. 53) instructions granted on behalf of the plaintiff, assigned as the 4th, 5th, 6th, 7th and 8th errors, respectively, and also to justify the

rulings of the court below in refusing the 8th (Tr. p. 55) and 14th (Tr. p. 58) instructions asked on behalf of the defendant below and refused, assigned as the 9th and 13th errors, respectively.

The act of 1906 does not apply to the case at bar because it does not apply to a carrier engaged in commerce between the State of Virginia and the District of Columbia.

We take it that no discussion is necessary to sustain the position that without the aid of the Employers' Liability Act of 1906, the defendant would have been entitled to the instruction directing a verdict for the defendant.

All of the rulings above mentioned were based upon the proposition that the injury received by the plaintiff was the result of the negligence of a fellow servant, for which the master would be answerable under the provisions of the Act of 1906.

In Howard vs. Illinois Central Railroad Co., 207 U. S., 463, this court held the Act of 1906 to be unconstitutional and void in so far as it applied to common carriers engaged in *interstate* commerce upon the ground that it imposed liabilities upon all common carriers so engaged, without qualification or restriction as to the particular *character* of the business in which the carrier or its employees might be engaged at the time of the injury, and that it therefore of necessity included subjects "wholly outside of the power of Congress to regulate." Mr. Justice White, in delivering the opinion of the Court, uses the following language at page 497, et seq.:

> "From the 1st section it is certain that the act extends to every individual or corporation who may engage in interstate commerce as a common carrier. * * * Now, the rule which the statute establishes * * * is that anyone who

conducts such business be a 'common carrier, engaged in trade or commerce *in* the District of Columbia, or in any territory * * * or *between* the several States.' That is, the subjects stated all come within the statute when the individual or corporation is a common carrier who engages in trade or commerce between the States. From this it follows that the statute deals with all the concerns of the individuals or corporations to which it relates, if they engage as common carriers in trade or commerce between the States, etc., and does not *confine* itself to the interstate commerce business which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in interstate commerce, and is not confined solely to regulating the interstate commerce business which such persons may do—that is, it regulates the persons because they engage in interstate commerce, and does not alone regulate the business of interstate commerce * * *

"Thus, the liability of a common carrier is declared to be in favor of 'any of its employees.' As the word 'any' is unqualified, it follows that liability to the servant *is co-extensive with the business done by the employers whom the statute embraces:* that is, it is in favor of *any* of the employees of *all* carriers who engage in interstate commerce. This also is the rule as to the one who otherwise would be a fellow servant * * *

"The act, then, being addressed to *all* common carriers *engaged* in interstate commerce, and imposing a liability upon them in favor of *any* of their employees, *without qualification or restriction as to the business in which the carriers or*

their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce. Without stopping to consider the numerous instances where, although a common carrier is engaged in interstate commerce, such carrier may, in the nature of things, also transact business not interstate commerce, although such local business may indirectly be related to interstate commerce, a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce, will serve to make clear the extent of the power which is exerted by the statute * * * Take a trolley line moving wholly within a State as to a large part of its business, and yet, as to the remainder, crossing the State line.

"As the act thus included many subjects wholly beyond the power to regulate commerce, and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution, and can not be enforced." (Howard vs. I. C. R. Co., 207 U. S., 463, 497 to 499.)

It is evident that the reasoning here applied to carriers engaged in both interstate and intrastate commerce, the one within and the other beyond the jurisdiction of Congress, applies with equal force to carriers engaged in both intrastate commerce and commerce between a State and the District of Columbia, unless the language applying its provisions to commerce "in the District of Columbia" is free of the vice pointed out by Mr. Justice White in regard to interstate commerce, that it imposes its liabilities upon all common carriers so engaged without qualification or restriction as to the

particular business in which the carrier *or its employees might be engaged at the time of the injury.*

It is practically conceded that if the injury here sued for had occurred within the limits of the State of Virginia, that the Act of 1906 could have had no application thereto, because the provision applying it to carriers engaged in commerce "between the District of Columbia and a State" is void for the same reason that the interstate provision was so declared. It is contended, however, that because the *injury* occurred *within* the limits of the District of Columbia that therefore the carrier was engaged in commerce *in* the District of Columbia, and as the power of Congress is plenary within the District of Columbia and this court in the case of El Paso Railroad Co. vs. Gutierrez, 215 U. S., 87, and in the case of Southern Railway Co. vs. Hyde, 31 App. D. C., 466, has held that so much of the act as applies to common carriers engaged in trade or commerce *in* the District of Columbia or *in* the Territories was valid, that therefore the plaintiff is entitled to the benefit of the provisions of the Act. This does not remove the difficulty, however, unless the term "commerce *in* the District of Columbia" is confined solely to regulating the purely "intra-district" business such person may do, so that the liability declared in favor of "any of its employees" may still be "coextensive with the business done by the employer" and yet not beyond the power of Congress.

It is true in the cases just cited, the court has held that owing to the plenary power of Congress within the District of Columbia and within the territories that the act in question is valid as to commerce "in" the District and "in" a territory. But the power of Congress to regulate commerce *between* the States is just as plenary as it is to regulate commerce *in* the District of Columbia.

The test as to the application of this legislation to the case at bar is not the plenary power of Congress to regulate commerce *in* the District of Columbia, any more than the plenary power of Congress to regulate commerce *between* the States was the test in the Howard case. The plenary power of Congress to regulate each of these classes of commerce is unquestioned. The real test is the exact character of carrier Congress intended to include within the provisions of the Act by the words "Carriers engaged in commerce *in* the District of Columbia;" whether that term was intended to embrace a carrier engaged exclusively in the territorial limits of the District, in which case the words "engaged in commerce between the District and a State" would be necessarily restricted to employees employed exclusively within the District, and therefore within its plenary power at the moment of injury, or did Congress use these words in the same sense that it used the words "engaged in commerce *between* the States" to include all carriers so engaged, without regard to the location or particular employment of an employee at the time of injury, and whether in either case Congress has by the language in which it has expressed its intent and applied it to all employees, included subjects over which it had no control.

This court has, by its decision in the Howard case, in effect stricken from the Employers' Liability Act of 1906 certain portions of the language therein used as to subjects over which the power of Congress was plenary, because by the same language it also undertook to exercise authority over other subjects as to which Congress had no power. Yet this court has held that after striking out the obnoxious language, enough of the act remains separable from the language so stricken out to enable it to give effect to the intent of Congress originally expressed by the remaining language. The

liabilities imposed by the statute, however, still apply in favor of *any* of the employees of *all* carriers who engage in the commerce "*in*" the District. If this term embraces a carrier who may also be engaged in intrastate or interstate commerce, it then applies to "any," and therefore, *all* of his employees "without qualification or restriction as to the business in which the carrier or their *employees* may be engaged at the time of the injury." And as was said of the "commerce *between* the States clause" under similar conditions, it "of necessity includes subjects wholly outside of the power of Congress to regulate." (Howard vs. I. C. R. Co., 207 U. S., p. 497.)

The language and conclusion of Mr. Justice White are sufficient to show that it is not the ultra vires intent alone which is eliminated from the law, but all language essential to the expression of that intent is eliminated.

The essential portion of the act to be here considered is as follows: (The italics are ours.)

> "Be it enacted, That every common carrier engaged in trade or commerce *in* the District of Columbia or *in* any territory of the United States, or *between* the several States, or *between* any territory and another, or between any territory or territories and any State or States or the District of Columbia or with foreign nations, or between the District of Columbia and any State or States * * * shall be liable to *any* of its employees for all damages which may result from the negligence of *any* of its officers, agents or employees or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances," etc.

From the language thus originally used it is evident that a distinction was present in the mind of the drafts-

man of the act, not only between commerce *in* the District of Columbia or *in* a territory, and commerce *between* the District of Columbia and any State, but also between "commerce *in* a territory" and "commerce *between* a territory and another," which would make the last words entirely senseless if the meaning now sought to be given to the word "in" in the expressions "commerce *in* the District of Columbia" and "commerce in a territory" is correct, for "commerce between a territory and another" would under that construction be bound to be "in" one or the other of the territories, and therefore always *in* a territory. It can not be that this language is intended to apply to commerce between noncontiguous territories with a State intervening, for that condition is provided for by the other expression, "or between any territory or territories and any State or States or the District of Columbia." In the language of the original act, therefore, the words "trade or commerce *in* the District of Columbia" was regarded as an entirely distinct and separate character of commerce from that "between the District of Columbia and any State," and as such was separately and distinctly named, classified and provided for.

The liabilities imposed by this act as pointed out by Mr. Justice White in the Howard case were made to depend not upon the *place* where the injury was received nor upon the character of the employee's duties at the *time* of his injury, but were made to depend solely upon the character of the commerce in which the *carrier* was engaged. And the character of the business in which the *carrier* was engaged being fixed, it under the terms of the act fixed the extent of his liability to *all* of his employees without regard to the nature of their duties, the locality of their injuries, or the character of the duties in which they were engaged at the time or which they were employed to perform. This was the vice of

the Act and this vice still adheres to it *if the meaning attached to the word "in" is as unrestricted as is necessary to sustain the construction here complained of.*

This is manifest from the reading of the act in question and this is the reason why this court held the act unconstitutional and void as to interstate commerce.

If the word *"in"* in the phrase "every common carrier engaged in trade or commerce *in* the District of Columbia" is not restricted to such carriers as are engaged *only* in intra-district business, it leaves the remaining portion of the act open to the identical objection that proved so fatal to the "commerce between the States" provision, to wit, that the test of the act is not the character of the employment of the particular employee nor the place of his injury nor the business in which the employer was engaged, but the nature of the employer's business without restricting it to those who were only engaged in the character of business over which Congress had plenary power; for we can as easily conceive of an employee of such a carrier engaged in commerce in the District of Columbia who is neither engaged in interstate commerce nor in intra-District commerce, as we can of a like employee of an interstate carrier if the word "in" is not confined to purely intra-District carriers. This word "in" must be so confined in its operation to save the act at all.

In Gibbons vs. Ogden, 9 Wheat, 1, 196, Chief Justice Marshall defines the difference between "in" and "between" as relating to commerce, and in the Howard case Mr. Justice White quotes the same with approval. He thus states clearly what is and what is not included within the expression "commerce between the States."

> "It is not intended to say that these words comprehend that commerce which is carried on between man and man *in* a State, or between dif-

ferent parts of the same State and which does not extend to or affect other States."

It will be noted that Chief Justice Marshall there refers to commerce which is not embraced within the term "between the States" as being only such commerce as is carried on "between man and man *in* a State or between different parts of the State *and which does not extend to or affect other States.*"

The Act of 1906 refers both to commerce "in the District of Columbia" and commerce "between the District of Columbia and a State." If under the definition of Chief Justice Marshall, in Gibbons vs. Ogden, commerce *between* the States embraces *all* commerce except that "between man and man *in* a State and *which does not extend to or affect other States,*" it follows that the expression "between the District of Columbia and a State or States" likewise embraces *all* commerce therein, except that which is carried on "between man and man *in* the District of Columbia or between different parts of the same, and which does not extend to or affect other States." This only leaves commerce which is wholly within the District of Columbia or between different parts thereof and which does not extend to or affect another State or States to be included in and covered by the other expression, "commerce *in* the District of Columbia."

As already pointed out, unless this word is so restricted, or if it is so enlarged as to apply indifferently to the employees of *all* common carriers engaged in commerce within the District of Columbia, whether they or their employees are also engaged in intrastate commerce or interstate commerce or not, it then leaves the argument of Mr. Justice White in the Howard case applicable to its full extent to the language so construed and must as inevitably result in the entire act

being declared unconstitutional. The quotation which we have already made from Mr. Chief Justice White's opinion in the Howard case could in that case be paraphrased to apply to the language so construed, as follows:

> "It is certain that the act (with the interstate provisions stricken therefrom) extends to every individual or corporation who may be engaged in the District of Columbia commerce as a common carrier. * * * Now, the rule which the statute establishes * * * is that any one who conducts such a business be a common carrier engaged in commerce in the District of Columbia * * * That is, the subjects stated all come within the statute when the individual or corporation is a common carrier who engages in trade or commerce in the District of Columbia. From this it follows that the statute deals with *all* concerns of the individuals or corporations to which it relates *if* they engaged as common carriers in trade or commerce in the District of Columbia and does not confine itself to the intra-district business, which may be done by such persons. Stated in another form, the statute is addressed to the individuals or corporations who are engaged in intra-district commerce and is not confined solely to regulating the intra-district or interstate and District commerce business which such persons may do—that is, it regulates the persons because they engage in commerce in the District without regard to character and does not alone regulate the business of intra-district commerce. * * * Thus, the liability of a common carrier is declared to be in favor of 'any of its employees.' As the word 'any' is un-

qualified, it follows that liability to the servant is co-extensive with the business done by the employer whom the statute embraces; that is, it is in favor of any of the employees of all carriers who engage in commerce in the District of Columbia. This also is the rule as to the one who otherwise would be a fellow servant. * * * The act then being addressed to all common carriers engaged in commerce in the District and imposing a liability upon them in favor of *any* employee without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce either between the States or in the District of Columbia.

"Without stopping to consider the numerous instances where, although a common carrier is engaged in commerce in the District of Columbia, such carrier may in the nature of things also transact business not interstate nor intra-District commerce, although such local business may indirectly be related to interstate or intra-District commerce, a few illustrations showing the operation of the statute as to matters wholly independent of interstate or intra-District commerce will serve to make clear the extent of the power which is exerted by the statute * * * Take a trolley line moving wholly within a State as to a large part of its business, and yet, as to the remainder, crossing the State line into the District of Columbia." (The case at bar!)

The only way to escape the result of this unanswerable argument of Justice White is to confine the

language "commerce in the District of Columbia" in the language of Chief Justice Marshall in Gibbons vs. Ogden to commerce "between man and man in the District of Columbia and between different parts of the District and which does not extend to or affect other States." Unless so confined, the act as sought to be construed by counsel for the defendant in error is open to the very objections which resulted in its being declared unconstitutional by this court so far as it affected interstate commerce carriers and for identically the same reasons.

The rulings of this court in the Gutierrez and Hyde cases are not contrary to this contention. They simply presented demurrers to declarations which alleged in the language of the statute that the carriers were engaged in the one case in intra-District commerce and in the other that the carrier was engaged in commerce in a territory.

The case of Butts vs. Merchants & Miners Transportation Co., 230 U. S., 126, amply sustains the proposition here announced, that a construction can not now be placed upon the word "*in*" in the phrase "commerce *in* the District of Columbia" which was not contemplated by Congress when it incorporated that language in the Act in connection with other language which has since been declared unconstitutional because too broad in its scope.

It is safe to say that if this act or no portion of it had ever been declared unconstitutional no one would ever have contended or even dreamed that the words "trade or commerce * * * between the District of Columbia and any State or States" was not expressly and aptly intended to apply to *all* cases such as the one at bar without regard to the *place* where the injury sued for was inflicted. Such is beyond question the meaning originally attached to this language as originally used

and courts exceed their proper function when in such cases they seek to extend to words used by the Legislature a scope and significance the Legislature never attached to them.

If Congress had undertaken to legislate for the District of Columbia alone in the Act of 1906 and had they only used the language of the Act in its emasculated condition, with nothing on the face of the Act to show that Congress was differentiating between commerce in the District and that between the District and a State, there might be some force in the contention of the defendant in error. But to give to this emasculated language the significance now sought to be given it is manifestly to give it a meaning contrary to the expressed intent as gathered from all the language used.

Again, can it be conceived that Congress concededly having the power to pass an act applying to employees of carriers engaged in commerce between the District of Columbia and a State without regard to the points at which injuries to employees of such carriers might occur, and attempting evidently to exercise the full power thus possessed, should so express its purpose as to make it apply to such an employee so long as he should be within the District of Columbia and leave him unprovided for the moment he passed beyond its limits? It may be well questioned whether Congress, having the power to impose such a liability on carriers engaged in interstate commerce or in commerce between the District and a State, could so exercise it as to make it effective for a part of the journey of such an employee only and ineffective for the residue. It would seem to require very cogent reasoning to show the necessity for such a discrimination as to the locality of the injury, to justify its use on the part of Congress.

But if it be conceded that Congress has such *power*, it can not be conceived that Congress would willingly

and intentionally engage in such hybrid class of legislation.

In view of the elimination of the greater portion of the Act of 1906, the real question in this case is, Did Congress originally intend by the language which the action of this court has left in the act to *partly* regulate the relations between those non-resident carriers and their non-resident employees whose line happened to cross the District line, based upon the locality of an injury to an employee, so that if two of their employees, whose duties were interstate, should be injured on the same trip as the result of the same negligent act just as the train was crossing the District line, that it would be possible for one to recover and the other not merely because the one was on the front car which had crossed the State line, while the other was on the rear car which had not yet reached the line? Clearly not.

We doubt if any precedent can be furnished where Congress has arbitrarily undertaken to make any employer liable in one place and not in another for the same act or class of acts and under identical circumstances, where it had the power to make the liability coextensive with the limits of the employment without some cogent reason therefor.

It is no answer to the argument to say that State legislation along similar lines, when expressed in general terms, has been limited to injuries occurring within the limits of the State, since no State legislation can be cited which has undertaken by its terms to make it applicable to any specific class of commerce based upon the distinction between commerce wholly within its boundaries and that between one and other States. Such legislation, according to its terms, has been applicable to all commerce that the State had any power to touch at the time, and the presumption being that the State was intending to exhaust its entire power and no lan-

guage being inserted in the clause showing an intent to limit the provision to intrastate commerce alone, the courts have applied such State provisions to all characters of commerce within its power at the time in the absence of legislation by Congress. It would scarcely be contended that if a State adopted a provision which by necessary implication showed that the valid language was not intended to apply to interstate commerce, that the courts would, in spite of such limitation, apply such a provision to such commerce also. Yet this in its last analysis must be the contention of the defendants in error if they attempt to sustain the action of the trial court or of the Court of Appeals of the District; in other words, that though the language of the act in applying it to "carriers engaged in commerce *in* the District of Columbia" in view of other provisions in the act, must have been intended *originally* to apply only to carriers engaged in purely intra-district commerce, now because another provision embracing expressly all carriers engaged in "commerce between the District and a State" and intended to embrace the very state of facts existing in the case at bar has been declared ineffective and wholly invalid, because it embraced within its terms subjects beyond the control of Congress, the courts must now be called upon to legislate and read into the words "*in* the District of Columbia" a meaning which the Congress which enacted them plainly never intended should be attached thereto.

Hence we submit that while the first section of the Employers' Liability Act has been held to be valid as applied to the District of Columbia, the portion so held valid applies and was intended to apply by Congress to carriers engaged exclusively in commerce *in* the District of Columbia and not to carriers engaged in commerce *between* the District of Columbia and a State.

2. THE ACT OF 1906 DOES NOT APPLY TO

THE DEFENDANT COMPANY, BECAUSE IT IS WITHIN THE DISTRICT MERELY A CARRIER OF PASSENGERS BY MEANS OF ELECTRIC CURRENT, AND THEREFORE IS NOT A COMMON CARRIER WITHIN THE MEANING OF THE ACT OF 1906.

The train on which Downey was employed was purely a passenger train and, as has already been seen, the Congressional charter prohibits any other than a passenger business in the District by the company.

It will be observed from the Liability Act already quoted that it applies to "every COMMON CARRIER engaged in trade or commerce." The question is: Is the defendant company, an electric trolley line, only authorized to engage in hauling passengers, while so engaged a "common carrier" within the meaning of the Act?

In the case of New York Central & Hudson River R. R. Co. vs. Shirley, 120 N. Y., Supplement at page 192, it is held that common carriers are carriers of property unless from the context it appears that carriers of persons are intended, for when carriers of persons are spoken of, they are designated as "common carriers of persons" or "passenger carriers," and in an act providing that no preference for the transaction of the business of a common carrier upon the cars, in the depots or upon the grounds shall be granted, the term must be limited to carriers of freight and hence does not include hackmen.

In Brewer vs. N. Y. L. E. & W. Railway Co., 45 Hun., 595; 26 N. E., 325; 11 L. R. A., 485; 21 Am. State, 647, it is said:

> "It is true that a carrier of persons is not subjected by law to the obligations of a common carrier nor is a carrier of persons a 'common carrier' in the strict sense of the term applicable to it."

The case of Central R. R. of Georgia vs. Lippman, 110 Ga., 665; 50 L. R. A., p. 673, involved the construction of Section 2276 of the Civil Code of that State, which reads as follows:

> "A common carrier can not limit his legal liability by any notice given either by publication or by entry on receipts given or tickets sold. He may make an express contract and will then be governed thereby."

The court in construing a clause on a ticket expressly limiting a passenger carrier's liability, said:

> "Undoubtedly if a carrier of passengers is a common carrier within the contemplation of this section of the code, and if the term 'legal liability' refers to the legal obligation of carriers of passengers to exercise extraordinary diligence to protect the lives of persons and passengers, then while the carrier may not limit such liability by notice, he may do so by an express contract."

And again, the court says, "It is significant that under this section the carrier who may limit his legal liability by express contract is denominated a common carrier * * * The term common carrier did not at the common law embrace a carrier of passengers, neither does it under the definition found in the Code in connection with Section 2276," and quotes with approval the definitions of Bouvier, Hutchison on Carriers, Sec. 47, and Greenleaf on Evidence, Vol. 2, Sec. 211, all as defining "common carriers" as *carriers of personal property purely* and that carriers of passengers are denominated common carriers of passengers or passenger carriers.

The language of the statute here in question is "every common carrier." Under the authorities cited it can not be held to apply to a purely passenger carrier.

The strictness with which laws such as the Federal Fellow Servant Law are construed is illustrated by the fact that the Supreme Court of Iowa in McLeod vs. Chicago, etc., Railway Company, 125 Iowa, 270; the Supreme Court of Massachusetts in Fallon vs. Westend Street Railway Co., 171 Mass., 249, 50 N. E., 636; the Supreme Court of Minnesota in Lundquist vs. Duluth Street Ry. Co., 65 Minn., 387, 67 N. W., 1006; Funk vs. St. Paul Street Ry. Co., 61 Minn., 435, 52 Am. St., 608, 29 L. R. A., 208; the Supreme Court of Missouri in Sams vs. St. Louis & Merimac R. R. Co., 174 Mo., 53, 61 L. R. A., 475; Godfrey vs. St. Louis Tourist Co., 107 Mo., 193, and Johnson vs. Metropolitan Street Railway Company, 104 Mo. Appeals, 588; the Supreme Court of Texas in Riley against the Galveston City Railway Co., 13 Texas Civil Appeals, 247, and the Supreme Court of Virginia in the case of Norfolk Traction Co. vs. Ellington, 108 Va., 245, have all construed fellow servant laws similar in effect and purpose to the Federal Employers' Liability Law of 1906, as applying *purely to steam railroads and not applying to street railways or railways operated by electricity.*

In the case of Funk against the Railroad Company, 61 Minn., 435, 29 L. R. A., 208, mentioned above, the fellow servant law there construed applied to "every railroad corporation owning or operating a railroad in this State." In delivering the opinion the court said:

> "Perhaps it may be conceded that, technically speaking, the term railroad *would include a street* railway so far as its roadbed was made of iron or steel rails for wheels of cars to run upon,"

and says again:

> "When the words of a statute are not explicit the intention is to be collected from the context

from the occasion and necessity of law, from the mischief felt, and the object and remedy in view." (Italics ours.)

And again:

> "Can it be fairly and reasonably held that it was a legislative intent to apply the term railroad to street railways? It is a matter of common knowledge that street cars operated by cable or electricity are more readily managed than those operated by steam, where long passenger and freight trains, with their weight and momentum, are not so easily controlled. A street car is generally run separately, rarely with more than two or three coupled together, and there is but little danger of collision. They do not run so rapidly, their movements are easily and quickly checked, and the roadbeds are constructed upon level or graded streets, without deep cuts, and generally lighted. Nor do street railways carry freight. The greatest railroad hazard and danger of personal injury to railroad employees arise from operating their trains. There is no such danger in operating street railways, whatever may be their motive power, because they do not carry freight. Especially is the danger in coupling their cars entirely absent,"

and concludes that street railways, though within the technical meaning of the terms used, were not within the mischief felt which resulted in the passage of the law and *therefore were not within the legislative intent.* If that result was reached when the street railway *is* within the technical meaning of the terms used, how much more should the same result be arrived at here when, as has been shown above, the business of the plaintiff in

error is *not* within the technical meaning of the terms used.

In the Missouri case of Sams against the Railway Company, 174 Mo., 53, 61 L. R. A., 475, above mentioned, the statute, like that of Minnesota, provided that every railroad corporation owning or operating a railroad in this State shall be liable, etc. In that case the defendant was shown to have been incorporated as an ordinary railroad company, and it was shown that it had exercised the right by eminent domain to condemn private property for a part of its right of way outside of the city; that its road in the city was in the city streets and of the same character as ordinary street railways, while in the country it was partly of that character and partly of the character of the ordinary steam railroads; and that the cars were moved by electricity under the ordinary trolley system and for the carrying of passengers only, except that defendant had one car propelled in like manner *as its passenger cars, which was used to carry the United States mail and one-half of it was arranged to carry freight or express packages and was so used;* and at page 481, L. R. A., it is said: "It is the peculiar nature of the hazard incident to the railroad business that makes the foundation of this statute. Reference to this peculiarity runs through all the cases sustaining the validity of the fellow servants statutes.

"In Railway Company vs. Ellis, 165 U. S., 150, 'Mr. Justice Brewer said the business in which they are engaged is of a peculiar dangerous nature and the liability in the exercise of its police powers may justly require many things to be done by them in order to secure life and property. Fencing by railroad tracks, the use of safety couplers, and a multitude of other things easily suggest themselves.'

"In Lavalee vs. Railway Co., 40 Minn., 263, 41 N. W.,

974, the court said: 'The frequency and magnitude of the dangers in which those employed in operating railroads are exposed; the difficulty, sometimes impossibility, of escaping from them, with any amount of care, when they come; the fact that a great number of men are employed, cooperating in the same work, so that no one of them can know all the others, their competency, skill, and care, so that he may not be said to voluntarily assume the risk arising from the want of skill or care by any one of the number are sufficient reasons for applying a rule of liability on the part of the employer to the employee so employed, different from that ordinarily applied between master and servant.'

"But no reason can be suggested why such difference should be founded, not on the character of the employment, nor of the danger to which those employed are exposed, but on the character only of the employer," and quoting from Johnson against the Railroad Company, 43 Minn., 222, 8 L. R. A., 419, where the court was considering what employees were within the scope of the fellow servants statute, said: "Therefore, after mature consideration, our conclusion is that if any limitation is to be placed by the courts upon the application of this statute, and upon constitutional grounds there must be, the only one which will furnish any definite or logical rule is to hold that it only applies to those employees who are exposed to the peculiar hazards incident to the use and operation of railroads and whose injuries are the result of such dangers," and concludes: "Men engaged in the operation of street railways are exposed to hazards, but not to the peculiar hazards which distinguish men engaged in operating steam railroads and which have made them a class for special legislation."

In Norfolk Traction Company vs. Ellington, 108 Va., 245, where the Court of Appeals of Virginia construed

the Virginia Fellow Servant Act, Sec. 162, Virginia Constitution, which applied to "every employee of a railroad company engaged in the physical construction, repair or maintenance of its roadbed, track or any of its structures connected therewith, or in any work in or upon a car or engine standing upon a track, or in the physical operation of a train, car, engine or switch, or in any service requiring his presence upon a train, car or engine," it is said: "If, therefore, it be conceded that the word *railroad* in its broadest signification would include both street railways and steam railroads, nothwithstanding a critical examination of the language of Section 162 and other portions of the constitution and laws of the State in pari materia, aided by the history and spirit of the provision, lead to the conclusion that the words *railroad company,* as employed in that section, were only intended to apply to railroads proper, or commercial railroads." To further sustain the conclusion that the employees of street and electric railways were not within the danger contemplated by this and similar statutes, the Virginia court gives the following interesting comparisons showing the "inherent dangers of the respective businesses of railroad companies proper and street railway companies," as illustrated by statistics taken from the reports of the State Corporation Commission of Virginia, and says: "In 1903 on steam railroads out of a total of 2,789 persons killed or injured by accident, 2,319 were employees. On electric railways, out of a total of 493 persons killed or injured by accident, 9 were employees. In 1904 on steam railroads out of a total of 2,781 persons killed or injured by accident, 2,264 were employees. On electric railways out of a total of 206 persons killed or injured by accident, 9 were employees. In 1905 on steam railroads out of a total of 1,812 persons killed or injured by accident, 1,353 were employees. On electric railways out of a

total of 230 persons killed or injured by accident, 19 were employees, and in 1906 on steam railroads out of a total of 2,277 persons killed or injured by accident, 1,775 were employees. On electric railways out of a total of 203 persons killed or injured by accident, 27 were employees," and concluded: "It is also worthy of notice that while the dockets of this court abound with fellow-servant cases occurring on steam railroads we recall *but one instance of the kind in connection with electric railways.*"

If we are correct in either of these positions, then the Employers' Liability Law does not apply to the case at bar and there can be no liability upon the defendant for the alleged negligence of the plaintiff's fellow servant.

In Washington, Alexandria & Mt. Vernon Railway Company vs. Trimyer, 110 Va., 856, the Supreme Court of Appeals of Virginia expressly held that the railway line of the plaintiff in error was not a "railroad within the provisions of sub-section 51 of Section 1294-d of the Code of Virginia (1904), which provides that

> "Whenever railroads cross each other on the same grade in this State the trains shall be brought to a full stop at least 50 feet before getting to the crossing."

Since the case at bar was decided by the Court of Appeals of the District this court has handed down its opinion in the case of Omaha & Council Bluffs Street Railway Co. vs. Interstate Commerce Commission, 230 U. S., 324, 57 L. Ed., 1501, reversing the opinion of the Commerce Court, which was cited by the Court of Appeals of the District in support of its conclusion in this case, 40 App. D. C., 147, where the principles here asserted are recognized and approved, and the distinction between street railways and commercial railways with-

in the contemplation of the original Interstate Commerce Act is sharply accentuated. Mr. Justice Lamar there delivered the opinion of the court, and on page 334, says:

> "The act must be interpreted by its own terms, and we must look to it as a whole, in order to determine whether it applies to street railroads carrying passengers between cities divided by a State line.
>
> "The statute in terms applies to carriers engaged in the transportation of passengers or property by railroad.
>
> "But in 1887 that word had no fixed and accurate meaning, for there was then, *as now* (italics ours) a conflict in the decisions of the State courts as to whether street railroads were embraced within the provisions of a statute giving rights or imposing burdens on railroads. The appellants cite decisions from twelve States holding that in a statute the word 'railroad' does not mean 'street railroad.' The defense cite decisions to the contrary from an equal number of States. The present record discloses a similar disagreement in Federal tribunals. For not only did the Commerce Court and the Circuit Court differ, but it appears that the members of the Commission were divided on the subject when this case was decided, and also when the question was first raised in Wilson vs. Rock Creek R. Co., 7 Interstate Commerce Reports, 83.
>
> "This conflict is not so great as at first blush would appear. For all recognize that while there is similarity between railroads and street railroads, there is also a difference. * * *
>
> "But all the decisions hold that the meaning

of the word is to be determined by construing the statute as a whole. If the scope of the act is such as to show that both classes of companies were within the legislative contemplation, then the word 'railroad' will include street railroad. On the other hand, if the act was aimed at railroads proper, then street railroads are excluded from the provisions of the statute. Applying this universally accepted rule of construing this word, it is to be noted that ordinary railroads are constructed on the companies' own property. The tracks extend from town to town, and are usually connected with other railroads, which themselves are further connected with others, so that *freight* may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce. Street railroads, on the other hand, are local, are laid in streets as aids to street traffic, and for the use of a single community, even though that community be divided by State lines, or under different municipal control. When these street railroads carry passengers across a State line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887. Street railroads transport passengers from street to street, from ward to ward, from city to suburbs, but the commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight 'between States,' 'between States and territories,' 'between the United States and foreign countries' * * * The railroads referred to in the act were not those having separate, distinct and local street lines, but those of whom it was required that they should make joint rates and

reasonable facilities for interchange of traffic with connecting lines, so that *freight* might be easily and expeditiously moved in interstate commerce."

A like reasoning applied to the statute here under consideration plainly indicates, 1st, that street railways merely engaged in the transportation of passengers are not common carriers within the meaning of the Act of 1906, because they are not authorized to engage in the transportation of freight and passengers in interstate commerce, and secondly, because the employees of such carriers are not within the evil contemplated by and intended to be directed by the legislation in question.

3. THE COURT ERRED IN ITS CONSTRUCTION OF THE ACT OF 1906 BY HOLDING THAT THE DOCTRINE OF ASSUMED RISKS WAS ABOLISHED BY THAT STATUTE, THEREBY PRACTICALLY IMPOSING UPON THE CARRIER THE LIABILITIES OF AN INSURER.

This erroneous construction is manifested by the 5th instruction granted at the instance of the plaintiff below and in the action of the court in refusing the 8th and 10th instructions requested by the plaintiff in error. These errors are specifically pointed out in the 6th, 9th and 11th assignments of error respectively.

The 5th instruction told the jury that they were "the exclusive judges * * * of *all* questions of negligence by the defendant and of contributory negligence of the plaintiff," while the defendant's 10th instruction refused by the court told the jury "that every person in entering the employment of another assumes the intrinsic risks of such employment; that by the term 'intrinsic risks' is meant such risks as usually flow from or accompany such employment, as it is usually conducted other than

the risk of the negligence of fellow servants, or the failure of a master to exercise due care in furnishing a safe place to work or in employing competent servants, and if the jury believe from the evidence that the plaintiff was injured by reason of such risks * * * then the verdict must be for the defendant."

The theory upon which the defendant asked this instruction was that the motorman made the usual stop at the stop sign and was signalled by the trolleyman to proceed and did proceed at the usual rate of speed and passed on to the draw in safety; that the trolleyman was not injured at the south end of the draw as the train passed from the south section of the bridge to the south end of the draw as claimed by him, but that he was injured *after* the train had traversed the draw entirely and was on the north end of the bridge where he was picked up; that the stop at the stop sign was not intended as a warning to the trolleyman to pull down the trolley wheel; that even if the motorman did not stop at the stop sign that this was no excuse for the failure of the trolleyman to keep the trolley rope ready to pull down his trolley at all times because he must be presumed to know that a trolley wheel was liable to jump the trolley wire at any time and any place on his route whether on the bridge or in the country; that it was his special duty to prevent this and that the faster the car was going the more incumbent was it upon him to maintain a strict watch on and control over his trolley wheel, and that the real cause of his injury was the fact that the trolley wheel escaped the wire at a place other than the break occasioned by the draw and that the risk of being unbalanced by the sudden jumping of the trolley wheel from the wire was a risk incident to his employ.

We will not quote all of the evidence in the record

tending to sustain this theory, but will call attention to some of the evidence to this effect.

Joseph G. Harris, a *witness for the plaintiff*, when "Asked if the stop sign was not for the purpose of preventing the car from running through an open draw, witness replied: 'You used to stop there and lots of times people used to get on and ride; we used to load passengers on there.' Then the trolleyman gave his signal to go ahead. When the front wheels of the first car strike the draw you know you are at the place where you ought to pull the trolley down." (Tr. p. 15.) This same witness "testified that it was customary for trains to stop at the stop sign; that this was for the purpose of seeing whether the draw was open or not; that no other stop was made between the stop sign and the draw." (Tr. p. 15.)

Joseph W. Dodd also testified on behalf of the *plaintiff* as follows: (Tr. p. 18.) "That it was the duty of the trolleyman to be on the constant lookout; the trolley was liable to jump at any time; it was his duty to have his hands on that rope ready to prevent it flying up at any moment; that it was no more liable to jump off on the bridge than it was going through the country; that his duties on the bridge were just exactly what they were going through the country, and if the trolley was liable to jump, it was safer to jump off on the bridge than it would be out in the country; that there are stay wires all along through the country and by the trolley jumping off it is liable to break these stay wires and pull the trolley out; in the country it is dark, and you can see much better on the bridge; a man can not get on that bridge without knowing it; that it is all lighted up; nor can he get to the draw without knowing it * * * ; the motorman does not give him any signal that you are about to get on the draw; the trolleyman can tell that by observation; he can tell by the lights

on the opposite bridge, by the number of spans he crosses, and by the fact that the front trucks strike the draw; if he just watches out, there is no reason in the world why he should not know that his car is approaching the draw, and it does not make any difference how fast he is going; it is just as easy to witness to pull the trolley down when the car is going fast as when it is going slow; when the car is going fast it would make him more particular to hold on to his rope, and when the car is going fast it is all the more the duty of the trolleyman to pull it down at this particular place; * * * the trolleyman can see it as well as the motorman; it is part of his duty to look out there just as much as it is part of the motorman's; if the trolleyman thought that the train was going too fast, he could cut off the power by simply pulling down that trolley; there is not any trouble for him to stop the car if he wanted to; all he would have to do would be to pull down his trolley and signal the motorman to stop; there is no trouble about that." (Tr. pp. 18-19.)

As above shown, it was the contention of the plaintiff that he was thrown from the car by reason of the train approaching the draw without warning to him; that by reason of that fact he was not paying the strict attention to his trolley pole that he otherwise would have been; that it flew up at the break and jerked him so that he lost his footing and that he fell from the car and was picked up at the south end of the draw span, as follows: "Q. When you arrived at this bridge span, what happened to you? A. The trolley went up and I went down between the cars. Q. I believe you stated that you were running 20 to 25 miles an hour? A. About that, sir." That the trolley pole went up; that witness was standing on the platform and it threw him right down backwards between the cars; that it was done very quickly; that witness supposed the tension in the pole

going up, threw him off; that he had hold of the rope at the time; that he never had a trolley fly off there before; that when he found himself after the accident, he was on the draw; could not exactly state the position. (Tr. p. 31.)

Again on page 33, the plaintiff testified that he had nothing to do on that bridge that night except to hold the rope; that he knew they were on the bridge; that he knew they were going from 20 to 25 miles an hour, going as fast as they could run there; that he could not tell exactly how long it would take to get to the draw; that he could not see why it was necessary to pull the trolley down; that by pulling the trolley down he could cut off the power, but he was not instructed to do that, he could do it; that it would cut off the light; that he could not tell exactly whether that stop sign is 300 feet from the draw. The plaintiff "further testified that the usual rate of speed he judged of these trains between Alexandria and Washington is about 25 to 30 miles an hour; that he never took any particular notice whether he was going any faster than usual that night making that trip; that he might have been going faster and might have been coming slower." (Tr. p. 33.) Again: "Q. How about when he struck the bridge? Was there anything unusual about that? A. Well, he was going pretty rapid. Q. Was he going more rapidly than usual? Did that attract your attention? A. No, not necessarily. Q. There was nothing then about his speed on the bridge to attract your attention? A. Well, I do not know how to answer that question. Q. Do you know whether your attention was attracted that night by any unusual speed on the bridge? A. Well, it was snowing, you know. Q. You do not know whether your attention was attracted or not; is that right? A. No; I do not think there was anything. It has been so long I can not remember." Again on page 34: "Witness

further testified that he had to wrap that trolley around his hand to pull the trolley down several times that night; at the time of the accident he was paying attention to the trolley; that the trolley pole got away from him before he knew it and the rope pulled him off the car; that he was standing on the platform waiting for the car to stop; that at this point where the danger is, it is his duty to hold the rope and get himself in position."

Harvey K. Shaner, the principal witness for the plaintiff, who was the conductor on the occasion of the accident, and who, by the way, testified in direct contradiction of his own written report of the circumstances of the accident, testified "that just as witness got to the draw, he heard a sound under the car, looked out of the rear window and saw Mr. Downey lying on the tracks; that Mr. Downey was lying right on the south end of the draw about four or five feet from the point at which the draw connects with the bridge." (Tr. p. 27.)

On the other hand, Wallace Groves, the motorman, testified as follows: (Tr. p. 41.) "That on the night of November 29, 1907, they left Alexandria at 10:30 with the train in good condition, and made the regular stop as usual at the stop sign; that he received the proper signals to proceed in crossing the draw; that he heard one bump of the trolley pole and about a second or two later received three bells, and thinking everything was all right to stop at the next station, began to feed the controller, and found that he had no current; that he received another bell and thought there was something wrong; that he applied the brake to make the stop; that as the car stopped the conductor came running up and said that Downey had fallen down between the cars and got run over; that he stepped from the car and looked back and saw Mr. Downey sitting between the tracks; * * * looking north, he saw the Falls Church car coming south

and the idea struck him that he would have this Falls Church car bring Mr. Downey down to his train; that they placed Mr. Downey on this Falls Church car and brought him back to the rear end of the witness' train; that at *the north end of the draw*, where the spans are disconnected, he heard the trolley strike, and subsequently received three bells * * *; that they usually passed that Falls Church car that they saw approaching that night, somewhere along in Potomac Park * * *; that the arc light was cut off that night; that they always cut it off at the south end of the bridge, because they had such good light on the bridge, and naturally did not need it; that witness can not state exactly at what speed they entered the draw that night, but it was very slow; that he had no cause to go fast; that it was about six or eight miles an hour, maybe; that he never heard of any speed regulation on the bridge at that time; that he never heard of there being any regulation of the company that there was a six-mile speed limit on that draw; that the stop sign is a safety stop to show that you have the car under control in approaching the draw; that his car was under control that night; that he had never heard of any rule that the trolleyman is supposed to receive any signal from the motorman that he is approaching the draw; that the witness had never used any and that there is no such rule in the rule book."

Fenton M. Fitzhugh, a witness on behalf of defendant and who was the motorman on the Falls Church car, mentioned by Motorman Groves as being the car he saw coming from the north immediately after the accident, testified (Tr. p. 39): "That he passed the car Downey was hurt on while it was standing on the north end of the bridge; that he saw the plaintiff, who was sitting on the left hand side of witness' car almost in between the tracks, near about the end of the first span from the north side of draw—the north side of draw,

next to Washington, that in going up to get the plaintiff, they did not go on the draw at all, but passed safety stop north of draw just before you go across draw, where we stopped, then proceeded up to where some men were standing around Downey, and stopped there and put him on our car and brought him back to the Alexandria car; that they got to the Mt. Vernon car before they got to the safety stop going down to pick Downey up; that plaintiff was sitting in the neighborhood of 50 feet from the north end of the draw; that witness had been running over that bridge since the Falls Church cars started running from Washington to Fairfax, about the first of June, 1907."

Charles Mumford, a witness on behalf of the defendant, testified as follows (Tr. pp. 37-38): "That witness is familiar with the duties of a trolleyman; that trolleyman is supposed to stand on the platform and have hold of the rope all the time; that his purpose in standing on the platform is to pull the trolley down in case it jumps; that if the trolley jumps and get away, it flies up and comes in contact with those wires; that it does not require any more effort to pull down a trolley wheel when it is going fast than when it is going slow; that there is no difference in the effort required; that the trolley can be pulled down with one hand, that they pull from 20 to 25 pounds; * * * that it was the trolleyman's duty to constantly hold the rope throughout the trip when the car was going, that he would hold on to the rope constantly throughout the trip in case it should fly off; that it is liable to fly off at any time; that it is more apt to fly off when the car is going fast than when it is going slow; that he did not see how it was possible for a man to be on the platform, either the front platform or the rear platform, of any train going across that bridge at any rate of speed up to 25 miles an hour without being aware of the fact that

he was on the bridge; that he can certainly tell the bridge when he comes to it; that he can see it, and can tell by the sound of the train if he was inside the car; that he does not see how it would be possible for him to enter on that bridge without seeing the superstructure of the bridge; that it would not be possible for him to approach the bridge at night without seeing the lights on the bridge; * * * that the bridge is lighted brilliantly as one of the main avenues here (referring to the city of Washington); that the stop sign is a safety stop; that the stop at that point was to keep from going into the draw; that that was the main reason the sign was put there; that witness does not know of any other reason for it being put there; * * * that the operation of pulling the trolley down so that the current is taken off, takes but an instant; that when the front truck hits the draw you can hear the bump; it is a wider place between the rails on the draw than any other place on the bridge; that it makes a different sound when you hit the draw; that the distance between the front wheels of the motor car and the point where the trolley wheel comes into contact with the trolley wire is about 25 or 30 feet; that witness does not believe the speed of a train has any effect upon the question of pulling the trolley down." Upon cross-examination (Tr. pp. 38-39) this witness further testified: "That it does not make any difference whether the car is going 5, 10, 15 or 20 miles an hour, that it does not require any more effort to pull the trolley down at 20 miles than it does at 5 miles an hour, as far as witness knows; that, of course, a man is supposed to be attending to his business all the time; that witness does not see where it requires any more care at all to pull it down at 25 miles an hour than at 5 miles, because if you were pulling it down, it is out of the way of everything and can not hit anything."

This testimony furnishes ample evidence to justify the

instruction based upon the theory that the plaintiff's injury resulted from one of the risks incident to his employ. It was objected to by the plaintiff upon the ground that the doctrine of assumed risks was abolished under the Employers' Liability Act of 1906 and that all questions of this kind were questions of fact for the jury.

It is unnecessary to cite authorities to sustain the proposition that at common law an employee assumes the intrinsic risks of his employment. The Court of Appeals of the District in P. B. & W. Ry. Co. vs. Tucker, 35 App. D. C., 123, after a full discussion of the doctrine of assumed risks as affected by this act of 1906, says:

> "It is enough that they must assume the intrinsic risk of their calling without compelling them to assume the negligence of their employers."

Thereby especially recognizing in that case the assumption by the employee of the *intrinsic* risk of the employment.

But the whole question has been concluded by the case of Seaboard Air Line Co. vs. Horton, 233 U. S., 492, decided by this court on April 27, 1914, where construing almost identical language, to wit, Section 3 of the Act of 1908, Mr. Justice Pitney delivering the opinion of the court says:

> "By Section 3 of the Act of 1908 it is declared that 'The fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the viola-

tion by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.'"

This case not only excluded intrinsic risk from the operation but *assumed* risks also, even though not intrinsic.

Section 2 of the Act of 1906 on the same subject provides:

> "The fact that the employee may have been guilty of contributory negligence shall not bar a recovery *where his contributory negligence was slight and that of the employer was gross in comparison;* but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. *All questions of negligence and contributory negligence shall be for the jury.*"

It will be observed that the Act of 1908 incorporates in Section 3 thereof all of the language of Section 2 of the Act of 1906, except that underscored, while the second act has the following not found in Section 2 of the Act of 1906:

> "* * * that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by any such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

But Section 5 of the Act of 1906, which is not found otherwise in the Act of 1908, accomplished substantially the purpose of the proviso just quoted, to wit:

> "That nothing in this Act shall be held to limit the duty of common carriers by railroads or im-

pair the rights of their employees under the safety appliance act of March 2, 1893 (27 Stat. at L., 531, Ch. 196, U. S. Comp. Stat., 1901, p. 3174), as amended April 1, 1896 (29 Stat. at L., 85, Ch. 87) and March 2, 1903 (32 Stat. at L., 943, Ch. 976, U. S. Comp. Stat. Supp., 1907, p. 885)" for in the Horton case the court says:

"By the phrase 'any statute enacted for the safety of employees,' Congress evidently intended Federal statutes, such as the Safety Appliance Acts (27 Stat., 531, ch. 196; 32 Stat., 943, ch. 976; 36 Stat., 298, ch. 160; Id., 913, ch. 103); and the Hours of Service Act (34 Stat., 1415, ch. 2939.)"

In discussing the latter act Mr. Justice Pitney says, referring to the first section, which gives the right of action for injury or death of any employee "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment," says:

"This clause has two branches: the one covering the negligence of any of the officers, agents, or employees of the carrier, which has the effect of abolishing in this class of cases the common law rule that exempted the employer from responsibility for the negligence of a fellow employee of the plaintiff; and the other relating to defects and insufficiencies in the cars, engines, appliances, etc. But, plainly, with respect to the latter as well as the former ground of liability, it was the intention of Congress to base the action upon negligence only, and to exclude responsibility of the carrier to its employees for defects and insufficiencies not attributable to negligence.

> The common law rule is that an employer is not a guarantor of the safety of the place of work or of the machinery and appliances of the work; the extent of its duty to its employees is to see that ordinary care and prudence are exercised, to the end that the place in which the work is to be performed and the tools and appliances of the work may be safe for the workmen. (Hough vs. Railway Co., 100 U. S., 213, 217; Washington, etc., Railroad Co. vs. McDade, 135 U. S., 554, 570; Choctaw, Oklahoma, etc., R. R. Co. vs. McDade, 191 U. S., 64, 67.) To hold that under the statute the railroad company is liable for the injury or death of an employee resulting from any defect or insufficiency in its cars, engines, appliances, etc., however caused, is to take from the act the words 'due to its negligence.' The plain effect of these words is to condition the liability upon negligence; and had there been doubt before as to the common law rule, certainly the Act now limits the responsibility of the company as indicated."

4. THE COURT FURTHER ERRED IN ITS CONSTRUCTION OF THE ACT OF 1906 IN GRANTING THE PLAINTIFF'S 7TH INSTRUCTION.

This instruction (Tr. p. 53) after stating the elements to be considered by the jury in event they should render a verdict for the plaintiff, added the following paragraph:

> "That you can take into consideration with the previous instruction which I have given you, and that if you find that he was negligent, and the defendant's own agent was also negligent, then you should diminish the plaintiff's recovery in such proportion as his negligence bears to the negligence of the defendant company."

This instruction is evidently based upon Section 2 of the Act of 1906, which provides that the fact of negligence on the part of the employee "shall not bar a recovery where his contributory negligence is slight and that of the employer was gross in comparison; but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." Even though we might concede for the purposes of the present argument that the Act of 1906 was applicable to such a case, the court in instructing upon the elements to be considered in event of both negligence and contributory negligence did not follow the *terms of the statute* which exempts a negligent plaintiff from the common law rule applicable to such negligence only when his negligence "was *slight* and that of the employer was gross in comparison," but in effect told them that in event of such negligence coupled with contributory negligence that it was no defense in bar under any circumstances and that contributory negligence could only serve to diminish the plaintiff's recovery without regard to the very important limitation stated in the statute, to wit, that the common law rule was only modified when the plaintiff's negligence was slight and that of the defendant gross in comparison.

5. THE COURT BELOW FURTHER ERRED IN THE CONSTRUCTION OF THE ACT OF 1906 IN REFUSING TO GIVE THE EIGHTH INSTRUCTION REQUESTED BY THE PLAINTIFF IN ERROR.

This is the 9th error above assigned. The instruction in question reads as follows:

> "If the jury believe from the evidence that the defendant company or its employees were negligent in failing to comply with its own regulation

to stop its car at the stop sign, before running on to the draw of the highway bridge, and that such regulation was adopted for the protection of the passengers and property of the defendant company from the dangers of an open draw and that it was also negligent in running its car on said bridge at an unusual rate of speed, and that the plaintiff knew these facts, or either of them, or in the exercise of due care should have known them, or either of them, and could with such knowledge by the exercise of due care and the means within his power have avoided the injury by pulling down his trolley pole, or by giving the motorman a signal to stop or otherwise, then it was his duty to do so without waiting for a stop or signals from the motorman, and his failure to do so would be gross negligence, and if it resulted in his injury, would be the proximate cause thereof and their verdict must be for the defendant."

The evidence already quoted in connection with the assignment of error just discussed sufficiently sets out the evidence which would justify this instruction.

In discussing the last preceding assignment of error we have called attention to the fact that the Act of 1906 so far as it bears on the question of contributory negligence differs from the Act of 1908, construed by this court in the Horton case supra in that while the Act of 1908 absolutely abolishes contributory negligence as a defence in bar, the Act of 1906 only abolishes it conditionally by incorporating in Section 2 the language next to be quoted, and which appears in italics, and which words do not appear in the subsequent Act of 1908, to wit: "The fact that the employee may have been guilty of contributory negligence shall not be a bar to the recovery *where his contributory negligence was slight and that of the employer was gross in comparison.*"

If this condition that the contributory negligence of the plaintiff is slight and that of the defendant is gross in comparison is the only circumstance which deprives the defendant of the right to have the court pass *as a matter of law* upon the defense of contributory negligence as a bar, it follows that if the negligence of the plaintiff was great and the negligence of the defendant was gross that contributory negligence under that act would still be a bar. In like manner if the negligence of both plaintiff and defendant were but slight the contributory negligence would still be a bar and *a fortiori* would it be if the plaintiff was guilty of gross negligence and the defendant was not.

The 8th instruction was based upon this theory of the law, to wit, that where it appears as it did appear from the plaintiff's own evidence in this case that it was his duty to maintain control over the trolley pole at all times while his car was in motion and that the defendant had adopted a regulation merely "for the protection of the passengers and property of the defendant company from the dangers of an open draw," and that the plaintiff in reliance upon that regulation had, in violation of his duty, assumed to rely upon compliance therewith as constituting a preliminary warning to him that a point in his journey had about been reached when it would be necessary for him to draw down his trolley pole and that this negligence even if it should constitute negligence at all could be but slight under such circumstances, because it was a regulation upon which the defendant had no right to rely, and in like manner, even though the car was on the bridge at an unusual rate of speed, this *quoad* the trolleyman constituted slight negligence; or if he knew these facts, knew of this negligence and with that knowledge could, by the exercise of due care and the means within his power, have avoided not only injury, but all possible risk of injury by simply

"The prevailing view being that such signals are intended only for the protection of persons or vehicles on the crossing, or about to use the crossing, and not (for example) for the protection of those driving along a highway parallel to the railroad; not of an employee of the railway company engaged in breaking stones for ballast near the track, who stepped upon the track at a point three hundred feet from the crossing, with his face turned away from an approaching engine; not of a trespasser on the track of a railway company at a place other than a crossing."

And after stating that some of the courts held contrary to this, says:

"Another court has reasoned that while the statutory duty to ring the bell or sound the steam whistle and check the train on approaching crossings is exacted primarily for the benefit of persons crossing the track, and not for those walking along it; yet, relatively to the latter, as well is to the former, *a failure to comply* with the statute is (italics are of the author) *evidence of negligence* to be considered by the jury. This, says this able author, however, seems to be unsound in that it proceeds in contravention of the principle that there can be no recovery, unless the omission of the statutory signals *is found to be the proximate cause of the injury.*" (Italics ours.) "*In the absence of evidence tending fairly to show that such is the fact, it will be the duty of the judge to direct a verdict for the defendant.*"

This authority is important in showing that *as a matter of law* the omission to observe a precaution adopted to avoid one danger can not be turned by employees into an act of negligence when they undertake to rely upon it for some other purpose than that for which it was originally adopted.

This principle was applied by the Supreme Court of Massachusetts in the case of Sullivan vs. Fitchburg Railway Co., 161 Mass., 106, 36 N. E., 751, to a regulation adopted by the company itself. The opinion was delivered by Holmes, J. He says:

> "The bill of exceptions states that it appeared in evidence that it was a part of the duty of trackmen to look out for wild trains, and they had no other means of protection except to take care of themselves. We do not regard this statement as qualified by the defendant's rule that wild trains 'must run cautiously around curves and over grade crossings, looking out for trackmen,' but accept the interpretation put upon the rule by the defendant's counsel, that the caution has reference to the safety of the train, not of the trackmen * * *"

It thus appears that the Supreme Court of Massachusetts *as a matter of law* undertook to construe this rule and did not, as the court below here did, submit the question to the jury to determine whether or not such a regulation is intended as a warning to the trolleyman.

7. THE SECOND ASSIGNMENT OF ERROR IS TO THE ACTION OF THE COURT IN ADMITTING THE EVIDENCE HERETOFORE SET OUT IN FULL OF THE WITNESSES JOSEPH G. HARRIS, GEORGE S. WHEDBEE AND WILLIAM C. LITCHFORD AS TO THE REPUTATION OF GROVES AS A RECKLESS MOTORMAN.

1st. None of these witnesses showed themselves as qualified to speak of his reputation. It is manifest that the witness Harris was not qualified to testify as to the reputation of Groves at the time of this accident.

The motorman had only been in the employ of the defendant six months preceding the accident. The witness Harris did not know when he was employed by the company, whether it was the last of 1906 or the first of 1907, or the last of 1905, and at the time of the accident was ticket agent and guide, and his testimony was that he had heard several of the employees say they would not work with him; that "he was reckless and a lot of fellows was afraid to work for him. I was myself;" that he had never heard of Groves having any accident or anybody being hurt with Groves. The whole foundation of his evidence was "that he had heard lots of fellows say they were afraid to work with him."

In the same way with the testimony of George S. Whedbee. He did not undertake to testify as to the general reputation. He testified that very frequently the motorman "approached the switches over the speed the company required" and that he reported to Mr. Green, the foreman, two or three times; that he had run past his signal across 14th and B streets at 12 or 15 miles an hour when the regulation prescribed 4 or 6 miles. He simply testified that when Groves "was a new motorman" and therefore unfamiliar with the regulations of the company; "they gave us green lights and they hired the new motormen and told us to hold the green lights up going around the curve there, and I gave him a signal and he never paid any attention to it," and that he had reported this condition to a Mr. Green, the foreman of the gang and a fellow servant of Groves and not an officer of the company at all. It does not appear that this information was ever brought home to any officer of the company empowered to em-

ploy motormen or to discharge them. Green was later called as a witness and denied that any such report had ever been made to him and denied that he had ever communicated any such information to any of his superior officers.

William C. Litchford was also permitted to testify on the same subject. He stated that he knew Groves and knew other men on the road who knew him. He first stated that he had heard his reputation as a motorman discussed and then changed his response and stated that he had heard the reputation of Mr. Groves as motorman in regard to running cars discussed by other men on the road, and without stating to what extent that discussion had gone or without stating that he was able to testify as to what the reputation was, was required by the court to respond to the question, "Now state what the reputation was," to which he responded that "Groves was noted to be a fast runner."

Clearly the statements of each of these witnesses and especially the last should have been excluded from the jury.

The evidence was further inadmissible because knowledge of this reputation was never brought home to the company. On the contrary, the entire evidence shows affirmatively that at the time the defendant company employed Groves he was in the employ of the Capital Traction Company as a motorman in good standing and that they gave him a letter stating that he was a competent motorman, which he presented to the defendant company, and upon the faith of which he was employed by the defendant, that he was then broken in by a motorman of the defendant company named Mowbrey and by another one named Munford, and that after he was broken in he was examined by the train dispatcher, Mr. Hayden, all of which establishes that the company exercised due care in employing him.

Again, all of this evidence was clearly inadmissible if the theory upon which the plaintiff relies and upon which the lower court submitted the case to the jury is correct, namely, that the Fellow Servants' Law makes the employer responsible for the negligence of the fellow servants.

At common law the employer was not responsible for the negligence of a fellow servant. He was responsible for the result of the negligence of a fellow servant. He was, however, responsible for the neglect of his duty to exercise due care in the selection and continuance in his employment of competent servants. It is upon this theory only that the reputation of an employee brought home to the knowledge of the employer prior to the injury is admissible in evidence, not to establish the fact of the negligence of the fellow servant, but to bring home knowledge of incompetency and thus fasten negligence on the master.

But if as was held by the lower court and by the Court of Appeals the master was responsible for the act of the fellow servant whether he had knowledge of his incompetency or not, there is no longer any excuse for the admission of evidence of general reputation, and its only effect in the case at bar was to permit the evidence of these witnesses as to general reputation to be used by the counsel for the plaintiff as it was used in the argument of this case before the jury to corroborate the witnesses for the plaintiff as to the fact of the *negligent* act of the employee as the proximate cause of the injury upon the theory that he having the reputation of being negligent it was all the more likely that the account of the occurrences on the occasion of the accident as narrated by the witnesses for the plaintiff was true.

The learned judge who delivered the opinion of the Court of Appeals of the District of Columbia recognized the fact that this evidence was *only* admissible upon the

theory that the Fellow Servants' Act of 1906 was *not* applicable to the case as made, where he says "It is apparent, therefore, that had the court as requested by the defendant, ruled that the Employers' Liability Act was not applicable, evidence of the incompetency of said motorman, if brought home to the company, *would* have been very material. Hence, it was clearly admissible when offered." (Washington, etc., Railway Co. vs. Downey, 40 App. D. C., 147, 154.)

Inasmuch as counsel for the plaintiff offered this evidence and at the very time they offered it were contending, and successfully, that under the law of the case the employer was absolutely responsible for the negligent act of the fellow servant, it is hard to agree with the statement of the learned Justice that this evidence "was clearly admissible when offered;" nor does the comment "as no motion was subsequently made to strike out the evidence and no charge requested concerning it, its pertinence at the time the case was submitted to the jury was not passed upon by the trial Court," seem warranted. At the time this evidence was admitted it was admitted without qualification by the trial court as competent evidence to be considered by the jury, over the repeated protest and objection of counsel for the defendant. It would be most unjust to deprive the plaintiff in error of the benefit of the objection because subsequently he did not move the court to again exclude from the consideration of the jury evidence which had been admitted over their protest. If seasonable objection is made to the reception of evidence when it is tendered, we know of no authority holding that it is incumbent upon counsel to again and at a later stage of the case move that the evidence be excluded.

The learned Court of Appeals in its opinion further attempts to justify its conclusion by saying (p. 154):

"Moreover, it is apparent from the prayers offered by the respective parties, and the charge of the trial court, that this evidence was lost sight of when the Liability Act was held applicable. The question then was not whether the motorman had theretofore been negligent, but whether he was negligent at the time of the accident."

This assumption of the learned judge that this evidence was lost sight of when the Liability Act was held applicable is quite a violent one and is contrary to the fact. It is true that the principal question then remaining was as stated by the learned justice, "not whether the motorman had theretofore been negligent, but whether he was negligent at the time of the accident," but it is also true that this evidence, being in the record as competent evidence in the case without restriction of any kind or character, could be considered by the jury as corroborative of their theory of the case, to wit, that their witnesses were speaking the truth when they stated that the motorman drove his car upon the bridge and past the stop sign and on to the draw at a high and excessive and dangerous rate of speed, because these witnesses had testified that he had the reputation of being a reckless and fast motorman, who was in the habit of running by signals without reducing speed or paying other attention to them, the evidence as to reputation therefore bore directly upon the question as to "whether he was negligent at the time of the accident" or not, and as a matter of fact, this very theory was argued before the jury by the able counsel for the plaintiff as they had the right to do under the evidence as it then stood in the record, having been admitted by the learned trial judge over the protest of the counsel for the defendant.

8. THE THIRD ASSIGNMENT OF ERROR IS TO THE ACTION OF THE COURT IN REFUSING TO INSTRUCT A VERDICT FOR THE DEFENDANT.

The fourth assignment of error is to the action of the court in instructing that it is the duty of a company acting through its agents and servants to exercise ordinary care to prevent and avoid injury to other employees while engaged in the discharge of their duties, and that failure on the part of the servants and employees in this regard would constitute negligence.

Both of these instructions involve the question as to whether or not the Fellow Servant Law of 1906 was applicable to this case, and has already been discussed.

9. THE FIFTH ASSIGNMENT OF ERROR, WHICH INVOLVES THE PROPRIETY OF THE ACTION OF THE LOWER COURT IN GRANTING THE SECOND INSTRUCTION OFFERED BY THE PLAINTIFF, INVOLVES THE APPLICATION OF THE FELLOW SERVANTS' LAW.

But this instruction was further erroneous because it submitted the question to the jury as to whether or not it was "a negligent and imprudent act for the motorman to run said car at a rapid rate of speed upon the draw, and if you believe from the evidence that the train was run at a rapid and dangerous rate of speed * * * upon and over said draw at the time of the accident to the plaintiff, which speed *prevented* the plaintiff from pulling down the trolley pole, caused the trolley to fly off at the south end of the draw and jerk or throw the plaintiff off the car while he was in the proper discharge of his duties, and that the said rate of speed was the proximate or direct cause of the accident and injury to the plaintiff, they may find a verdict for the plaintiff," and further told the jury that, "In determining the question

of whether the *rapid speed* was the cause of the plaintiff's inability to pull down the said trolley pole, you will consider all the testimony of both plaintiff and defendant as to the effect of the speed of the car or the facility with which the trolleyman could pull down said pole."

There is no evidence in this record to support the conclusion that speed "prevented" or could prevent the plaintiff from pulling down the trolley pole. On the other hand the uncontradicted evidence is that speed and especially speed on the bridge had no effect on the ability of the trolleyman to pull down the trolley pole. The plaintiff's own witness, Dodd, testified (Tr. p. 18): "That of course there is no regular signal for the trolleyman when he reached that draw; that the motorman never gives you any signal." And again, on the same page: "That it was the duty of the trolleyman to be on the constant look out; the trolley was liable to jump at any time; it was his duty to have his hands on that rope ready to prevent it flying up at any moment; that it is no more liable to jump off on the bridge than it was going through the country; that his duties on the bridge were just exactly what they were going through the country and if the trolley was liable to jump, it was safer to jump off on the bridge than it would be out in the country * * *; in the country it is dark and you can see much better on the bridge; a man can not get on that bridge without knowing it; that it is all lighted up; nor can he get to the draw without knowing it * * *; it is the duty of the trolleyman to watch out for the draw * * *; there is no reason in the world why he should not know that his car is approaching the draw, and it does not make any difference how fast he is going; it is just as easy to witness to pull the trolley down when the car is going fast as when it is going slow; when the car is going fast it would make him more par-

ticular to hold on to his rope, and when the car is going fast it is all the more the duty of the trolleyman to pull it down at this particular place."

This was a witness introduced on behalf of the plaintiff. Various other witnesses testified to the same effect.

George S. Whedbee, another witness for the plaintiff, testified (Tr. p. 25): "That it was the duty of the trolleyman to stand with his hand on the rope continually, and that he must not take his hand off the rope while the car is in motion because the trolley is liable to jump, and if he hits a span it will tear the span and knock the trolley out; this is the purpose of his being there; that it is his duty to do this going through the country, over the bridge or anywhere else." On page 26, that "he must not have so much slack that it will get away from him." That the judge who presided at this trial so understood the evidence is shown by the following comment: (Tr. p. 29.)

> "I think the testimony is fairly construed as showing that it (the trolley wheel) was liable to fly off anywhere, and he, the trolleyman, was there for that purpose, to keep it from flying off on the bridge or anywhere else. I am inclined to think this evidence may be admissible on a theory that I do not care to state in the presence of the jury."

The plaintiff himself testified (Tr. p. 34) that it was his "duty to hold the rope so that if the trolley did go off you would be in a position to restore it to the wire if it comes off."

The witnesses for the defendant were unanimous in regard to the same matter. Charles Munford, an old and experienced motorman, testified (Tr. p. 38) "that it does not require any more effort to pull down a

trolley wheel when it is going fast than when it is going slow; that there is no difference in the effort required; that the trolley can be pulled down with one hand; that they pull from 20 to 25 pounds." Upon cross-examination (pp. 38-9) he stated: "That it does not make any difference whether the car is going 5, 10, 15 or 20 miles an hour, that it does not require any more effort to pull the trolley down at 20 miles an hour than it does at 5 miles an hour * * *; that witness does not see where it requires any more care at all to pull it down at 25 miles an hour than at 5 miles, because if you were pulling it down, it is out of the way of everything and can not hit anything."

The only possible effect that speed could have on the trolley wheel would be to cause it to fly off and yet the uncontradicted evidence is that the trolley was liable to fly off at any time and that it was the duty of the trolleyman to be on the constant lookout and stand guard against it. The only thing that would justify him in relaxing this vigilance would be the fact that he supposed the car was about to stop. He would never be justified in supposing that a car going at a rate of 25 or 30 miles an hour was about to stop, so that the instruction is not only unsupported by any evidence, but is absolutely inconsistent with the very theory upon which it is granted.

The instruction is further erroneous in that it assumes in the last clause thereof added by the court, as a conceded fact that at the time of the accident the car was going at a negligent and "rapid speed" and that as a matter of fact there was an "inability" on the part of the plaintiff to pull down the trolley pole and merely submitted to the jury the question of whether the assumed rapid speed, as to which the evidence was conflicting, was responsible for the assumed inability to pull down the trolley pole, as to which last assumption

there was not only no evidence to sustain, but the evidence affirmatively showed it did not and could not exist.

The 6th, 7th and 8th assignments of error involve the correctness of the 5th, 6th and 7th prayers granted at the instance of the plaintiff. They are all based upon the proposition that the Fellow Servants' Law of 1906 was applicable to the case and have already been discussed. In addition to this fault, however, the 5th instruction granted at the instance of the plaintiff is erroneous when read in connection with plaintiff's 1st, because the first instruction is general in its nature and is not confined to the allegations of negligence contained in the declaration in that it says that it is the duty of the company "acting through its agents and servants to exercise ordinary care to prevent and avoid injury to its other employees while engaged in the discharge of their duty, and to this end it is the duty of the servants and employees of railroad companies in charge of and operating trains and cars to exercise ordinary care to prevent and avoid injuring other employees working or employed upon said cars," and says further: "And the failure on the part of such railway company's employees in charge of the movement of such trains or cars to exercise such ordinary care and prudence is negligence," without confining the jury to the allegations of negligence contained in the declaration or in any way cautioning them to that effect, and when read with the 5th instruction, which tells the jury that "they are the exclusive judges * * * of *all* questions of negligence by the defendant" without limiting them to the charges of negligence alleged in the declaration, could but have the effect of leading the jury to believe that they were not confined to the allegations of negligence contained in the declaration.

10. THE 9TH ASSIGNMENT OF ERROR IS TO THE ACTION OF THE COURT IN REFUSING THE 8TH PRAYER ASKED BY THE DEFENDANT. (Tr. p. 55.)

This instruction in one aspect is based upon the theory that the company is not responsible for the negligence of a fellow servant and thereby involves the application of the Act of 1906 to the case, but even assuming that the Act of 1906 is applicable, this instruction should still have been granted, because there was evidence to sustain the theory that the plaintiff had or should have discovered his own peril; that having ready at his hands ample and adequate means to avoid injury to himself, which he failed to use, his failure to do so constituted the proximate cause of his injury and that the preceding negligence of the motorman was the condition and not the proximate cause of the accident.

This instruction is not based upon the doctrine of contributory negligence nor on the theory of comparative negligence; nor does it involve the doctrine of concurrent negligence. It is based in the view of the case now being presented solely upon the doctrine of the "last clear chance" or discovered peril; and upon the hypothesis which is clearly supportable under the evidence that after the discovery of his peril the plaintiff could, by his sole act, have avoided the result of the preceding negligence of the motorman and failed to do so. It is well recognized by the authorities that in such a state of facts such act of the plaintiff is the sole proximate cause of the injury and not the preceding negligent act or acts of the defendant. This may be a novel application of the doctrine of the last clear chance, but if the principle upon which this doctrine is founded is sound it can be applied to a negligent plaintiff as well as to a negligent defendant.

There was ample evidence in this case to justify the hypothesis upon which the instruction is based. It is submitted that when these facts exist that the defendant in such a case is just as much entitled to have this principle applied to the plaintiff as under like circumstances the plaintiff would have to have it applied to a defendant.

The doctrine of the last clear chance is usually applied in favor of a plaintiff who has been guilty of negligence which has been followed, *after knowledge and power to avoid the injury*, by the further negligence on the part of the defendant in failing to use the means within his power to avoid the injury. The reason for this rule is not in derogation of the rule that contributory negligence defeats recovery, but is an application of that other rule that the injury must be ascribed to the proximate cause. In 29 Cyc., page 530, the rule is thus stated:

> "While the negligent act or omission of the person injured ordinarily defeats recovery, the rule is subject to the exception or qualifications that although such person has been guilty of negligence in exposing himself to danger, yet he may recover if the defendant, *after knowing of such danger*, could have avoided the injury by the exercise of ordinary care, and fails to do so, as in such case the negligence of the person injured *is not the proximate cause* of the injury, and the negligence of defendant becomes the *proximate* cause."

If this is the rule to be applied to a negligent defendant, who may owe no primary duty to the negligent plaintiff, but whose duty may merely arise out of the knowledge of the negligent plaintiff's perilous position, coupled with power in himself to avoid the injury, with how much more force should it be applied to a negligent

plaintiff, who, notwithstanding the primary negligence of the defendant, sees and realizes or should realize his own peril, and has within his own power the means of saving himself, and negligently fails to do so, because the primary duty of every one is to save himself from peril? If, with the power to avoid injury plaintiff fails to do so, then his negligence becames the *proximate cause* of the injury and not the prior negligence of the defendant. In Kaw Supply Co. vs. Kroenig, 167 Ill., 560, 47 N. E. R., 1051, 1052, it is said:

> "It is a long established rule of law, founded in natural justice, that 'the mere relation of master and servant can never imply an obligation on the part of the master to take more care of a servant than he may reasonably be expected to take of himself.' (Priestly vs. Fowler, 3 Mees & W. I.) This rule was quoted and applied in Pennsylvania Co. vs. Lynch, 90 Ill., 333, and was again given expression in Furnace Co. vs. Abend., 107 Ill., 44, as follows: 'The relation of master and servant implies no obligation on the master to take more care of the servant than the servant is willing to take of himself.'"

11. THE COURT ERRED IN APPROVING THE ACTION OF THE TRIAL COURT IN REFUSING THE 9th PRAYER ASKED BY THE DEFENDANT BELOW. (10th Assignment of Error.)

This instruction merely submitted to the jury the theory of the case based upon the defendant's evidence. If the facts as stated in this instruction were believed to be true by the jury—and it is clear that there was ample evidence to sustain a finding that they were as stated therein—they required a verdict for the defendant. The defendant was entitled to have its theory of

the case submitted and passed on by the jury. (District of Columbia vs. Gray, 1 App. D. C., p. 500.)

> "An instruction, stating the law applicable to one theory of the case, and substantially covering all the facts upon which the correctness of such theory depends, is proper, if there is any evidence in the case tending to prove such facts, although it ignores other facts put in issue as part of another and different theory which, if true, leads to a different conclusion and result when another instruction has been given in the case, covering such conflicting theory." (Rhoades vs. Chesapeake, etc., R. Co., 49 W. Va., 494, 39 S. E., 209.)

The court had presented fully the plaintiff's theory of this case. Instruction No. 9 merely submitted to them the defendant's theory, and yet the court refused to submit it to the jury.

> "It is the duty of the court to submit to the jury and give instructions thereon any issue, theory, or defense which the evidence tends to support, and this right, of course, is not affected by the fact that there is countervailing testimony." (38 Cyc., 1626, and cases cited, note 68.)

12. THE COURT ERRED IN REFUSING THE DEFENDANT'S 13TH INSTRUCTION. (Tr. p. 58, 12th Assignment of Error.)

This instruction in effect told the jury that if the plaintiff had not "proved to them satisfactorily that he was injured in the manner and form alleged in his declaration they must find for the defendant, even though they may be convinced that some negligent act of the defendant or its employees caused or contributed to his injury." This merely applied to the well recog-

nized and established doctrine, 1st, that the allegata and the probata must correspond, and 2d, that the jury must be satisfied with the proof of the allegations.

The 13th assignment of error is based on the proposition that even though the Act of 1906 applied to common carriers engaged in commerce between the District of Columbia and a State that it did not apply to a street car company engaged in the business of transporting passengers by trolley, because such commerce was within neither the technical definition of the common carrier nor within the evil sought to be remedied by the legislation in question and had been fully discussed heretofore.

13. THE COURT ERRED IN REFUSING THE 15TH PRAYER ASKED BY THE DEFENDANT. (Tr. p. 58, 14th Assignment of Error.)

This instruction submitted to the jury the defendant's theory amply supported by the evidence "that the defendant's car made its usual stop at the stop sign and then proceeded (even at a speed in excess of that provided in its rules) * * * and passed safely on to the draw with the plaintiff holding the trolley rope in his hand, and that thereafter the trolley escaped * * * while he was attempting to adjust it to the trolley wire after getting on said draw, or as the car was about to pass from the draw to the north end of the bridge, or otherwise, then their verdict must be for the defendant."

If the facts stated in this instruction are true it absolutely negatived the proposition upon which the plaintiff's entire case was rested, that no stop was made at the stop sign, but that the motorman without making that stop proceeded at a high and negligent rate of speed with the result that the plaintiff was jerked from his car as it passed on to the draw, for the reason that

if the facts therein stated are true the motorman passed on to the draw in safety, and therefore the mere fact of passing on to the draw at a rate of speed in excess of that prescribed by the rule could not have been the proximate cause of the injury alleged in the declaration.

14. THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY THE QUESTION OF THE INTENT AND PURPOSE OF THE STOP SIGN AND THE RULE ISSUED IN CONNECTION THEREWITH. (15th Assignment of Error, Tr. pp. 64-65.)

The objectionable part of the charge in addition to the instructions heretofore discussed, is as follows:

> "If you believe * * * that the purpose was that the employees of the said company should stop to ascertain whether the draw was open or not *for the purpose of protecting travelers upon the road, and for that purpose only, then the failure to stop could not be relied upon by the plaintiff in this case for recovery* * * * *because the rule was not promulgated or adopted for his benefit* * * * but, if you believe that it was adopted for his benefit, then you have a right to rely upon it, and if the car failed to stop and he was injured by reason of the failure, and it was the proximate cause of the failure to stop, then he would be entitled to recover."

The vice in this charge is threefold:

1st. In instructing the jury as to the circumstances under which the trolleyman would not be entitled to rely upon the stop sign rule it requires them to be satisfied of two elements, to wit, that the purpose of the rule

was (a) that the employees of the said company should stop to ascertain whether the draw was open or not, (b) for the purpose of protecting travelers upon the road, *and for that purpose only.* It is submitted that the court should not have used in its charge the second qualification "for the purpose of protecting travelers upon the road and for that purpose only." The essential element was not how many different purposes of the company the rule might accomplish, but whether or not it was intended as a warning to the motorman that a break in the trolley line was being approached. If it was intended for this purpose plaintiff had a right to rely upon it. If it was not intended for this purpose he had no right to rely upon it for that purpose, however many other purposes it may have had in view, and in doing so he did it at his peril. The authorities already discussed in connection with the admission of the evidence on the stop sign and rule are equally applicable to the present assignment.

It is contrary to public policy that employees of common carriers should be permitted to pervert rules adopted for the protection of the lives of passengers and to whom they owe the highest degree of care, to serve them as an excuse for neglecting the very duties they are employed to perform upon the ground that they had learned to rely upon the rules adopted for the safety of passengers as a personal warning to themselves in other respects. Such a doctrine if recognized not only has a tendency to encourage negligence and inattention to the duties on the part of an employee, but also has the tendency to deter carriers from adopting rules calculated to enable them to perform better their duties to the public and to their passengers for fear that their employees will take advantage of such rules to neglect the primary duties of their employment and

to fail to take proper care for their own safety and the safety of those committed to their care.

The second vice is that in stating the converse of the first proposition the court by the use of the following language stated it incorrectly: "But if you believe that it was adopted for his benefit, then you have the right to rely upon it." While the court was careful to confine the operation of the first proposition involving the purpose of the rule to the protection of "passengers who rode on their train from being propelled into an open draw * * * for that purpose only," in the converse we find no such limitations, but gives the trolleyman the benefit of relying on this rule if "it was adopted for his benefit," without restriction.

It might be entirely true and doubtless was true that the rule was adopted for the protection of the trolleyman *from* the danger of being propelled into an open draw, and if this train had been propelled into an open draw owing to the negligent failure of the motorman to observe the stop sign, then such negligence would have been the proximate cause of the injury and the plaintiff would have been entitled to a recovery provided the Fellow Servants' Law is held applicable to his case, but this is a very different proposition from that which the court submitted to the jury, to wit, that the fact that such a rule might have been adopted to have protected him from the dangers of an open draw would also entitle him to rely upon the failure of the motorman to make the stop as an excuse for his own failure to perform other and primary duties which it was his sole duty to perform without notice or warning of any character, and which, if performed, would have avoided the injury.

It is therefore respectfully submitted that the judgment of the Court of Appeals of the District of Columbia and of the Supreme Court of the District of Columbia

above complained of, should both be reversed and annulled and this case remanded for a new trial.

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In the Supreme Court of the United States

OCTOBER TERM, 1914.

WASHINGTON, ALEXANDRIA AND MT. VERNON RAILWAY COMPANY, PLAINTIFF IN ERROR,
VS.
EDWARD A. DOWNEY, DEFENDANT IN ERROR.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

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VS.
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BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

The defendant in error filed his declaration in this action against this plaintiff in error, alleging that it had an office and officers and agents and was doing business in the District of Columbia. That on the 29th day of November, 1907 (the date of the grievances complained of), it was engaged in operating its cars over certain lines of railway upon divers streets in the city of Washington, and from the intersection of B street and 14th street southwest, it owned, possessed, operated, and controlled a double line of railroad tracks, extending from said 14th street to the Potomac River, and from thence to and across the Highway Bridge spanning the river in the District of Columbia. That it was a common

carrier of passengers and freight for hire and was engaged in trade and commerce in said District, and also between the said District and the State of Virginia, with its cars and trains operated upon the said tracks by motor cars propelled by electrical power and machinery. That wires were strung over the center of the tracks on the said bridge, from which the power was conveyed to the motor by a trolley wheel at the end of a metal pole, pressed upward and underneath the wire by a spring affixed to the top or roof of the motor car. The pole extended over the top of the motor car and over its rear platform. That at the end of the pole was affixed a grooved metallic wheel and a rope. The rope was used by the trolleyman to adjust the wheel to the wire or to release it therefrom under signals and orders from the motorman or conductor. That the Highway Bridge was constructed with a "draw," at each end of which the railroad tracks and overhead trolley wire were disconnected. That it had issued orders to its mortormen and conductors to stop the trains at either end of the draw before attempting to cross it, and had stop signs or signals at each end of the draw. That it was the duty of the engineer or motorman in control of the cars to obey the orders and signals to stop the cars before entering upon the draw, and then to proceed slowly and with caution upon the draw, so that the trolleyman could pull down the wheel where the wires were disconnected and prevent its becoming violently displaced and flying off and upwards by force of the spring, and causing damage and injury. That the stopping of the cars as aforesaid was notice to the trolleyman that the disconnection at the draw was about to be reached and to be in readiness to pull down the trolley. That Downey, a trolleyman in its service, at about 10.45 o'clock at night on November 29, 1907, was in the discharge of his duties upon one of its trains then passing over the bridge in the District

of Columbia. That the motor car was governed, operated and controlled by Wallace Groves, its motorman, officer, agent and employee, charged with the duty to start and stop the train and to regulate its speed, and "thereupon it became and was the duty of the said defendant, through and by the said Wallace Groves, its officer, agent and employee to stop the said train before passing upon the said draw and thereby notifying the plaintiff of the train's approach to the said place," etc. That said Groves violated his duty in not stopping the train as aforesaid and by running it upon the bridge and draw in the District at a high, excessive and unlawful rate of speed, and Downey's post of duty being in the center of the rear platform of the car, he could not see or know of the near approach of the car to the end of the draw where the wire disconnection was, while holding the said rope and awaiting the stoppage of train in the usual and customary manner before passing on the draw. That the negligence of the said Groves in running the said train onto the draw without stopping, at said excessive speed, caused the trolley wheel to be thrown with great force and violence from the wire at the place of disconnection, and breaking the pole and jerking and throwing Downey down and running over one of his legs, resulting in its amputation. That this injury was caused wholly by the negligence of the plaintiff in error, and not by any fault or negligence of his.

No plea to the jurisdiction nor demurrer to the declaration was filed by the defendant, but its defense rested solely upon the plea of "not guilty," upon which the issue was joined and trial had.

The defendant during the progress of the trial took two exceptions to the introduction of plaintiff's evidence which constitute its first and second assignments of error in plaintiff in error's brief and to the refusal of the trial court to

grant certain prayers submitted by it to be given to the jury. The objection to the plaintiff's prayers granted by the court and the exception to the refusal of the court to grant defendant's instruction at the close of the evidence to find a verdict for the defendant seems to involve the question as to whether any evidence at all was adduced by the plaintiff to sustain the averments of the declaration, and for this reason some portions of the testimony bearing upon and supporting the allegations of the declaration are herein incorporated for convenient reference by the Court, under Par. 3, Rule 21 of this court.

E. Forrest Burrell, passenger on the train at the time of the accident, and had traveled on the defendant's train "twice daily for eight years" (Tr., 15):

> "The defendant's road was through the District of Columbia into the State of Virginia and carries passengers and freight" (Tr., 16).

That the motorman, Groves, did not before crossing the draw stop the train at the stop sign, as required by the company's rule, in force at the time of the accident, November 29, 1907, as follows:

> "FEBRUARY 8, 1906.
>
> "General Notice.
>
> *"Before crossing the draw trains must come to a full stop at point indicated by a red board on which is the word 'stop!'*
>
> "J. COLVIN, *Superintendent"* (Rec., 12).

E. Forrest Burrell, a passenger on the train:

> "It (the train) did not stop at the 'stop' sign" (Tr., 16).

Edward A Downey, plaintiff:

"The train did not make any stop at all" (Tr., 30).

Harvey K. Shaner, conductor of the train:

"This train did not stop or slow up at the south end of the draw. 'That the motorman went on the bridge at *not less than* 20 *or* 30 *miles an hour,*' just as he told witness 'I had her wide open;' that *he did not change his speed up to the time he hit the draw.* He should judge he (the motorman) was running about 20 *or* 30 *miles an hour across the draw*" (Tr., 27).

The motorman ran the train upon the draw at a high and dangerous rate of speed.

E. Forrest Burrell:

"*When we got to the draw of the bridge* I never paid any particular attention to it, except I know *we were going at a high rate of speed.* * * * I should say it was *about* 20 *miles an hour*" (Tr., 15-16).

Edward A. Downey:

"The train was going 20 or 25 miles an hour; the spans were going past him very fast * * * *the train did not slow down any*" (Tr. 30).

"That he received a visit from Groves after the accident. Groves said when he took the cars across the bridge, he had the motor car wide open; he blamed himself for the injury; that he didn't like to say that he didn't stop at the stop sign because he was liable to be fired for it; that Groves said he was going across there at a reckless rate of speed—60 miles an hour" (Tr., 48).

Susie F. Downey:

> "Groves on his visit to her husband said that he was to blame for the accident. * * * that he had the train wide open, and if the train could run at 60 miles an hour, he was making it" (Tr., 49).

Charles W. Nowland:

> "Groves said he went across the draw with his controller wide open" (Tr., 50).

The speed of the train in crossing the draw, as shown by the oral testimony of the witnesses, is confirmed by the physical fact that the train ran within a span and a half of the north end of the bridge, or over one thousand five hundred feet, of its own momentum, with the power or current cut off, before the motorman Groves could stop it.

Harvey K. Shaner:

> "After he gave the signal to stop, the car ran between two and three hundred yards, anyhow; that he jumped off the car after he gave the signal to stop, and the car did not stop; that when he jumped off, the car was running so fast it threw him clean across the roadway against an iron girder ten or fifteen feet from the track; that there was no power on car during that time" (Tr., 27-28).

Edward A. Downey, asked to approximate the distance the car went after the accident before it stopped:

> "I judge about a *square and a half;* I could not tell you exactly" (Tr., 31).

Edgar O. Brookes, defendant's witness, conductor on Falls Church Road:

> "That as they were on the bridge his motorman

slowed up and passed Mount Vernon car, *about one and a half spans from the north end of bridge;* that they were going southward" (Tr., 40).

Wallace L. Groves, defendant's witness and motorman:

"Q. How near were you to the north end of the bridge when you stopped?

"A. *I suppose about a span and a half.* * * * that when the Falls Church car came up he got on its front end" (Tr., 43).

Charles Sinclair, defendant's witness, civil engineer in the employ of defendant:

"The length of the draw is 292 5/100 feet; * * * that the approximate distance from the north end of the bridge to the north end of the draw is 1,600 feet" (Tr., 36-37).

Charles Gill, defendant's witness, testified:

"That there are seven spans on the bridge north of the draw, and four spans south of the draw which with the draw makes twelve altogether; that each span is approximately 230 feet long and the draw is 290 feet long" (Tr., 40).

Thus, from the point at the south end of the "draw," where the plaintiff was thrown off the car, to a point one span and a half, or 335 feet, from the north end of the bridge where Groves stopped the train, was 5½ spans, or 1,265 feet, plus the length of the draw, 290 feet, a total distance of 1,555 feet, before the cars could be brought to a stop, because the defendant's witness Groves testified that—

"he received another bell and thought there was something wrong and *applied the brake to make the stop*" (Tr. 41-42).

Shaner, conductor, testified that—

> "just as he got to the draw he heard a sound under the car, looked out the rear window and saw Mr. Downey lying on the tracks; that he gave a signal for the motorman to stop" (Tr., 27).

The speed of the train is further attested by another physical fact that the trolley pole was

> "about 2 inches thick; that it was of iron or steel; that it was bent and there was a crack on the underneath side; that it was bent in the shape of an elbow" (Tr., 28).

John Dutcrman, defendant's witness, testified:

> "that the overhead braces on that bridge are approximately between 32 and 35 feet apart; that these braces are about 7 inches wide and 5 inches high, and that they go clear across; that the wire is fastened on them; that the trolley wires are attached about 6 inches below these braces so *that if the trolley went up only six inches it would strike the iron eye-beams on that bridge;* that there are six of then to each span, and that they extend across the bridge about 32 feet; *that this is true of the draw as well as at the other portions of the bridge*" (Tr., 45).

It is shown by the testimony of *Joseph G. Harris* that a trolley wheel is affixed at the end of the trolley pole, which is kept in position underneath the wire by a

> "big steel spring—pretty strong and heavy spring. It is a double spring, about that big around" (indicating) (Tr., 12).

The velocity of the train when passing on the "draw" is illustrated by the fact that when the trolley wheel flew off

at the point of disconnection in the wire and struck "the iron eye-beam on the bridge" the force was such as to bend the steel trolley pole, two inches in diameter, upwards and in the shape of an "elbow."

The points of wire disconnection and the ends of the draw were dangerous places in the passage of the trains.

Joseph G. Harriss, plaintiff's witness, testified that at the time of the accident he was acting as ticket agent for the defendant company; prior to that time he had acted as trolleyman and guide (Tr., 11).

> "I have had trolley poles to pull out on this draw at the bridge" (Tr., 12). "If the trolley was not pulled down crossing the draw it would either break off, pull off or burn your hands up with the rope; it was so strong that the rope would burn your hands—pull through your hands and burn you *and pull you up; take you up in the air*" (Tr., 13).

John T. Curtain, cross-examined by defendant:

> "If it (the trolley) hit the top of the bridge *it would pull me off my feet*" (Tr., 27).

The plaintiff testified

> "that the trolley pole got away from him before he knew it, and the rope pulled him off the car; that he was standing on the platform waiting for the car to stop; that *at this point where the danger is, it is his* duty to hold the rope and get himself in position" (Tr., 34).

The defendant's motorman Groves not only violated the "General Notice" promulgated by the defendant on February 8, 1906, to its motormen, that "*Before crossing the draw*, trains must come to a full stop" (Tr., 12), but he also violated another rule of the company regulating the speed of trains in crossing the draw.

William C. Litchford testified:

> *"That if the car is running over six miles an hour the trolley will not ride across the disconnection at the draw"* (Tr., 23). "That there was a written notice posted in the company's office at 12th and Pennsylvania avenue in the conductor's room in the order book as follows:
>
> " 'Reduce your speed to *six miles an hour across the draw.*'
>
> "It was *pasted in the order book* by Mr. Colvin, superintendent."

That he first saw the order

> "when I was promoted conductor in 1907. Conductors were supposed to read that book every day and sign their names" (Tr., 23). "The motorman was required to look at it, and sometimes the conductors would read it and sign the motorman's name and go down and tell him what the order called for. That witness' name was signed to the order" (Tr., 24).

The plaintiff called for the production of the order book (Tr., 23). Subsequently the defendant produced the order book and

> "two of such orders which had been pasted therein and signed underneath on the page of the book by the witness William C. Litchford *et al. were missing"* (Tr., 35). *"The dates of the missing orders antedate the accident"* (Tr., 35).

The order book was offered in evidence by the plaintiff. The motorman Groves also violated the speed regulations prescribed by the District Commissioners for the running of trains or cars limiting such speed to 15 miles per hour and providing a penalty for such violation. On objection by the defendant the District ordinances as to speed were excluded

by the court, it being of opinion that they were not applicable to the highway bridge, upon the theory that the bridge was under the control of the War Department. The ordinance is a police regulation operating upon and controlling the actions of individuals within the District territory, wherever they might be, and even if it be conceded, which it is not, that the Department controlled the bridge as a physical structure, *persons on the bridge* were subject to District authority as to speed regulations as a matter of police power in the absence of Department rules on that subject.

Smith vs. District of Columbia, 12 D. C. App., 33.
Clements vs. Potomac Elec. Power Co., 26 D. C. App., 482.

The defendant's trolleyman Groves entirely disregarded the usual and customary methods of the employees in operating the train in entering upon and passing over the "draw," although he was cognizant of the danger to the train by neglecting to follow those methods.

Joseph G. Harris testified:

"The wire was disconnected at each end of the draw. The disconnection is three or four inches long" (Tr., 12). "The motorman should stop before reaching the draw *and not start again until he got a bell from the trolleyman*" (Tr., 12). "After stopping at the stop sign motorman would get a bell from the trolleyman to proceed *and would slow up when he got to the draw to give the trolleyman opportunity to pull down the trolley*" (Tr., 15).

Joseph W. Dodd:

"Train dispatcher would give new man an order to 'break in.' New man would go with the order to the conductor, who would turn him over to the trolleyman.

He (witness) had him (Downey) for a couple of days breaking him in as trolleyman" (Tr., pp. 16-17).

"Q. What did you tell him about the stop sign?

"A. Why, I told him the 'stop sign' there is for the motorman to stop on account of the draw, and wait for a signal to go ahead.

"Q. When he stops does he have to have a signal to go ahead?

"A. Yes, sir.

"Q. Who gives that?

"A. *The trolleyman.*

"Q. Is that a rule of the company?

"A. Yes, sir.

"Q. What, if any, instructions did you give Mr. Downey when you broke him in, in regard to the stop sign on the draw at the bridge and the trolley arrangement at that place?

"A. I always instruct the trolleyman I break in when they get to the stop sign to get ready to pull the trolley down when they hit the draw.

"You can tell when you hit the draw by the red gate there. The gates are at the draw 'itself.' So when you hit the gate you also hit the draw.

"Q. By hitting the gates you mean you are at the draw?

"A. Yes, sir.

"Q. The gates are on the draw?

"A. Right on the draw where it opened.

"Q. So when you pass the point where the gates are, at the same time you pass on the draw, do you not?

"A. Yes; when you get even with the gates you are right even with the draw" (Tr., 17).

That he instructed Mr. Downey

"that after the motorman comes to the stop at the stop sign he always told him (Downey) to get himself in position so he could pull the trolley down as he entered the draw" (Tr., 18).

Edward A. Downey, plaintiff:

"Q. What instructions were given you as to the crossing of that draw by those who broke you in?

"A. I was told that the train comes to a full stop at the south end or north end of the draw going north or going south *at the stop sign, the purpose of stopping there was to prepare you to pull down your trolley when you come to this parted rail.* I have always pulled it down when I crossed that. I never had it to pass over. I always got myself in position to do my duty" (Tr., 32). "Had been instructed by the trolleyman who broke him in that cars must proceed very slowly when entering upon the draw" (Tr., 30). "That in going on or off the draw the train is going very slow" (Tr., 33-34).

John T. Curtain:

"Q. What was the object of the stop sign that was there?

"The man who broke me in always told me *to stop there to signify to pull down the trolley, to watch for the draw and pull down the trolley*" (Tr., 26).

Harvey K. Shaner, conductor:

"That the purpose of the stop sign is for the safety of the train in general; by this witness testified that he meant the passengers, the company's property, employees and all; that he always considered the stop sign a *warning to trolleymen*" (Tr., 30).

Charles Mumford, defendant's witness:

"That it (trolley) is more apt to fly off when the car is going fast than when it is going slow" (Tr., 38).

Frank M. Fitzhugh, defendant's witness:

"Running at a low rate of speed it (trolley) will ride

(the wire); that is, *if both spans are together straight across*" (Tr., 40).

E. Forrest Burrell:

"That on this bridge they (trains) usually run about 10 miles an hour and then slow down gradually until they go to this stop sign. * * * that when they cross the draw they go at a very slow speed" (Tr., 16).

Joseph G. Harris:

"Unless you are going at a pretty good speed the trolley will not jump off at the draw" (Tr., 14).

Joseph W. Dodd:

"Well, if running 8 or 10 miles an hour it (trolley) will not ride over it" (Tr., 18).

The evidence as above set forth could produce no other conviction upon the minds of the jury than that Groves, the defendant's motorman in charge of the movement and speed of the train over the bridge and draw, in running the train at from 25 to 30 miles an hour was guilty of such a high degree of negligence as amounted to positive recklessness as to the safety of the train and all persons carried thereon. And the court was bound, under the evidence, as matter of law, to submit the question of the defendant's negligence to the determination of the jury.

C., M. & St. P. Ry. vs. Astery, 137 U. S., 507.
Rechard vs. Chicago & C. Ry. Co., 141 Fed., 905.

ANSWER TO PLAINTIFF IN ERROR'S FIRST AND SECOND PROPOSITION OF ARGUMENT.

The Act of 1906 Applies to This Case.

The counsel for plaintiff in error begin their argument at page 20 of their brief under the caption of "Errors upon which the jurisdiction of this court is invoked," and embrace the consideration of the 3d, 4th, 5th 6th, 7th, 8th, 9th, 11th and 13th assignments of error for the reason as therein stated that all of them are involved in the construction of the Employers' Liability Act of 1906. They claim that the said Act does not apply to a common carrier engaged in commerce between the District of Columbia and Virginia, even though the injury and its cause arose in said District. Upon this assumption the defendant below asked the Court to instruct the jury "to return a verdict in favor of the defendant," and the refusal of the Court to so instruct is made the third assignment of error. The defendant contends that although the Act has been declared valid as to every common carrier engaged in trade or commerce in the District of Columbia that if such commerce was effected by the circumstance of having been brought into the District from elsewhere before the happening of the injury in the District, the Act becomes inapplicable to the situation and the common carrier thereby becomes exempt from the liability imposed by the statute. The defendant also further contends that the act only applies to common carriers engaged in commerce solely, wholly and exclusively within the District and that if any part of the commerce of the carrier extends beyond its territorial limits such fact operates a suspension of the liabilities imposed by the Act of Congress

in the exercise of its constitutional power of legislation over the District.

It is submitted that these arguments are totally wanting in merit, and are not now, owing to the constitutional power of Congress and the previous decisions of this court construing that power, the subject of serious consideration by it.

Defendant's counsel quote at large from the opinion of the majority of the court in the Employers' Liability Cases 207 U. S., 463, to sustain their construction of the Act, but it is submitted that a correct apprehension of the opinion in that case establishes the contrary proposition. In that case one of the chief obstacles to a construction of the statute favorable to its validity by holding it to embrace employes when engaged in interstate commerce only, was the consideration that such interpretation would necessarily restrict the act in its application to common carriers in the District and territories and confine it to such employes only and destroy it as to all employees of common carriers engaged generally in commerce in the District and territories. This Court refused to so limit the Act.

> "The legislative power of Congress over the District of Columbia and the territories being plenary and not depending upon the interstate commerce clause, it results that the provision as to the District of Columbia and the territories if standing alone could not be questioned."
>
> Employers' Liability Cases 207 U. S., 500, 501.

Subsequently the case of El Paso, &c., Ry. Co. vs. Gutierrez came before this Court from the Territory of New Mexico, wherein this Court held that the provision as to the District of Columbia and the Territories did stand alone, and was separable from the unconstitutional feature of this act

in its relation to the States and was a valid enactment as to them.

215 U. S., 87.

This case is referred to at p. 24 of defendant's argument where in the discussion of the opinion it is said:

> "This (the decision) does not remove the difficulty, however, unless the term 'commerce *in* the District of Columbia' is confined solely to regulating the purely 'intradistrict business.' "

Thus it is pertinent to inquire what were the facts in the Gutierrez case, because if he was injured while the El Paso railroad was engaged in inter-territorial business the case has no application possibly upon this particular question, but if at the time of his injury the common carrier was engaged in interstate commerce or between the territory and one or more states and he was likewise engaged in such work at the time of his injury the case stands as ruling this assignment of error as with a rod of iron, for it is not conceivable that this Court would reverse a case so thoroughly considered, and decided by a unanimous Court.

Plaintiff's counsel have examined the record in that case, and quote the language of the petition:

> "Third. That said railroad company on and prior to June 22d, 1906, was operating trains over the track owned by it from Newman Station in New Mexico to and beyond Carrezozo, New Mexico, and was engaged as a common carrier of commerce in said territory and from said territory into States adjoining thereto, and defendant was at and before June 22, 1906, acting in maintaining said track through working trains and otherwise.
>
> "Fourth. That Antonio Gutierrez * * * was employed by defendant corporation with other employees on and about one of the work trains used by the said

company in maintaining said track and roadbed, which said train was then being operated for the purpose of repairing and maintaining said track."

The declaration in the case then relates that the injury to and death of the plaintiff was caused by the negligence of a fellow servant of the plaintiff in the act of switching the cars composing the train. (Tr. of Records and briefs, October Term, 1909, Vol. 47, Rec. p. 2.) The defendant in its answer in that case demurred to the petition "because it did not set up facts sufficient to constitute a cause of action."

Same citation, p. 4.

The facts of the case sustained the allegations of the petition, and upon such pleading and such facts this Court without a dissenting voice sustained the plaintiff's right of recovery for an injury in a territory sustained by an employee of a common carrier caused by the negligence of a fellow servant at a time when the common carrier, the injured employee, and the fellow servant were all engaged in commerce between the territory and the States adjoining thereto. This Court, in giving its reasons for sustaining the act of 1906, in part said:—

"When we consider the purpose of Congress to regulate the liability of employer to employee, and its evident intention to change certain rules of the com-common law which theretofore prevailed as to the responsibility for negligence in the business of transportation, we think that it is apparent that had Congress not undertaken to deal with this relation in the States where it had been regulated by local law, it would have dealt with the subject and enacted the curative provisions of the law applicable to the District of Columbia and the territories over which its plenary power gave it

> the undoubted right to pass a conrolling law, and make uniform regulations governing the subject."
> 215 U. S., 97.

The various States prior to the Act of Congress, June 11th, 1906, had enacted legislation as to certain common carriers changing the common law rule exempting the master from liability to a servant for injuries inflicted by the negligence of a fellow servant and making the master liable for such injuries caused by such negligence with the State without regard to the nature or character of commerce they were engaged in, at the time the injuries were so inflicted, whether it was commerce among the States, or exclusively internal or domestic commerce, and the exercise of this power of legislation and the judicial power to enforce it has, since the adoption of the constitution, always been conceded to the several States until supersessional Congressional legislation became enacted for the regulation of commerce among the States under the special grant of the constitution as to such powers.

> Chicago, &c., Ry. vs. Solan, 169 U. S., 133, 137;
> Pennsylvania vs. Hughes, 191 U. S., 477;
> Martin vs. Pittsburg, &c., Railroad, 203 U. S., 284;
> Pierce vs. Van Dusen, 78 Fed. Rep., 693.

As was said in the case last cited by the Court of Appeals of the Sixth Circuit composed of Mr. Justice Harlan and Judges Taft and Lurton,

> "the Ohio Statute is not applicable alone to railroad corporations in Ohio engaged in the domestic commerce of this State. It is equally applicable to railroad corporations doing business in Ohio and engaged in commerce among the States, although the statute, in its operation, may affect in some degree a subject over

> which Congress can exert full power. The States may do things affecting commerce with foreign nations and among the several States until Congress covers the subject by national legislation."

If the States had the power to enact legislation of the kind in question in aid of commerce or in the exercise of their police powers judicially enforceable within their territorial limit, what is to be said of the power of Congress over the territory of the District of Columbia?

Article 1, Section 8 of the Constitution provides:

> "The Congress shall have power to exercise exclusive legislation in all cases whatsoever over such district * * * as may become the seat of the government of the United States."

It has been repeatedly decided by this and other courts that this power is only limited in its exercise by the prohibitory provisions of the Constitution against the passage of laws of attainder, or *expost facto*, or abolishing trial by jury, or establishing religion, or authorizing unreasonable searches, or other general limitations imposed by that instrument, or its amendments, upon the power.

In Employers' Liability Cases 207 U. S., at p. 500, this Court said that

> "The legislative power of Congress over the District of Columbia and the Territories being plenary and not depending upon the interstate commerce clause,"

the provision as to them if standing alone could not be questioned.

Upon the same subject this Court again in El Paso Ry. vs. Gutierrez, 215 U. S., at pp. 94, 95, said:

> "It was not intended to hold the act unconstitutional

> in so far as it related to the District of Columbia and the Territories, for it is there suggested that to interpolate in the Act the qualifying words contended for would destroy the Act in respect to the District of Columbia and the Territories by limiting its operation in a field where Congress had plenary power, and did not depend for its authority upon the Interstate Commerce clause of the Constitution."

And further emphasizing this proposition at said page 95, the Court said:

> "As we have already indicated its (Congress') power to deal with trade or commerce in the District of Columbia and the Territories does not depend upon the authority of the interstate commerce clause of the Constitution."

The commerce clause of the Constitution, Art. 1, Sec. 8, specifically confines the power to regulate commerce under that particular clause to be "with foreign nations, among the several States, and with the Indian tribes." The District of Columbia and the Territories not being States, this provision does not extend to them, and hence it was that the Employers' Liability Act was first directed to the control of common carriers in those jurisdictions under the general power of Congress over the Territories and its special constitutional power of exclusive legislation *in all cases whatsoever* over the District of Columbia.

The citation of appellant from the opinion of Ch. J. Marshall in Gibbon vs. Ogden, 9 Wheat., at p. 196, which was decided in 1824 as to what is excluded from the phrase "commerce among the States" is unfortunate for the defendant, as the Chief Justice confined it to commerce between man and man *in a State*, or between different parts of the *same State*, and which does not extend *to or affect other States.*

Manifestly, the Chief Justice did not intend to embrace the District of Columbia within the definition because he had already in 1805 decided in Hepburn vs. Ellzey, 2 Cranch, 444, that the District of Columbia is not a State within the meaning of the Constitution in provisions concerning the States where the word "State" is used. To the same effect are the comments of Mr. Justice Miller upon the case of Gibbon vs. Ogden, to be found in Stoutenburgh vs. Hennock, 129 U. S., at page 154, where in adopting the language of the opinion in the case of Gibbon vs. Ogden he was of opinion that commerce between the States and the District of Columbia was not that commerce between States provided for in the commerce clause of the Constitution.

The Southern Railway Company was engaged as a common carrier of passengers and freight from various points in the State of Virginia and other "points" outside of the territorial limits of the District through the State of Virginia, and into the District of Columbia. In the case of Southern Ry. Co. vs. Hyde, 31 App. D. C., 466, suit was brought for injuries causing the death of Hyde, occasioned by the negligence of a fellow-servant in the District of Columbia. The declaration alleged that Hyde was killed in the District while employed by that company through the negligence of a fellow-servant. Upon demurrer to the declaration the Court of Appeals, reversing the lower court, held that the act was valid and operative as to such injuries occurring within the District of Columbia without distinction as to the kind of commerce the carrier was engaged in at the time of the injury. At page 470, 31 D. C. App., that court, construing the act and meeting the objection to its applicability therein made and herein interposed, emphatically remarked:

> "As said therein (Employers' Liability cases) the power of Congress in the District of Columbia is

> plenary, and extends to the regulation of all commerce of whatsoever nature that may be carried on within its boundaries; and the act *expressly applies to all employees of common carriers in said District without regard to the character of the commerce engaged in.*"

And in the El Paso vs. Gutierrez case, 215 U. S., at pages 97 and 98, this court fully approved the opinion of the Court of Appeals in that case, this court saying:

> "While not binding as authority in this court we may note that the act, so far as it relates to the District of Columbia, was sustained in a well considered opinion by the Court of Appeals of the District of Columbia. Hyde vs. Southern Ry. Co., 31 App. D. C., 466."

Counsel for the defendant, at page 33 of their brief, in effect, concedes the application of the Act of 1906 to the District of Columbia, saying that "if Congress had undertaken to legislate for the District of Columbia alone in the act of 1906 and had it only used the language of the act in its emasculated condition with nothing on the face of the act to show that Congress was differentiating between commerce in the District and that between the District and a State there might be some force in the contention of the defendant in error." The decisions of the various courts, including this court, in holding that Congress first had in mind the application of the Act to the District and Territories in passing the act and in separating and holding valid that portion of the act relating to the District and Territories brings the case precisely within what is conceded by defendant's counsel in the extract from their brief above quoted.

The defendant further claims immunity from the act claim-

ing that within the District it is "merely a carrier of passengers by means of electric current" and for that reason it is not a common carrier within the meaning of the act (Plaintiff in Error's Brief, p. 35, et seq.). A number of cases are cited construing statutes of States prohibiting common carriers from granting preferences in the business at depots and grounds, limiting their liability by contract or construing statutes imposing duties upon "railroad companies" in certain instances, none of which are precedents in the construction of the all-embracing terms of the Employers' Liability Act relating to *common carriers.* The insistence of defendant that it was only a common carrier of *passengers* is utterly unfounded, as the evidence proved that it "carried passengers and freight" (testimony of E. Forrest Burrell, Tr., 16). The declaration alleged that the defendant carried passengers and freight for hire; the evidence proved that, and the defendant offered no evidence to contradict a fact of such common knowledge, a denial of which might have involved it in serious consequences under its Virginia charter. The defendant in its petition for a writ of error addressed to the judges of this Honorable Court and upon which the writ was awarded, removes the subject from further discussion. It alleges "That petitioner on the 29th day of November, 1907 (date of accident) and for a long time prior thereto had been a common carrier of passengers and freight for hire engaged in trade and commerce between the District of Columbia and the State of Virginia by means of cars and trains of cars propelled over its railway tracks by electric power."

The act clearly designates the agencies embraced in its terms to be "every common carrier engaged in trade or commerce in the District of Columbia," etc., and provides no exceptions as to urban, suburban or interurban electric railroads or trolley lines, and the above language of the statute has already received judicial construction by this court.

"From the first section it is certain that the act extends to every individual or corporation who may be engaged in interstate commerce as a common carrier. Its all-embracing words leave no room for any other construction. It may include, for example, steam railroads, telegraph lines, telephone lines, the express business, vessels of every kind, whether steam or sail, ferries, bridge, wagon lines, carriages, trolley lines, etc." Employers' Liability Cases, 207 U. S., 463, 497.

Certainly the defendant will not controvert the fact that it was operating a "trolley line," as it proved that fact by its own testimony.

The defendant asks the court to construe the act so as to exclude from its compass and scope all carriers not engaged in trade or commerce wholly within the District of Columbia. If this construction were adopted by the court, all the steam railroads entering the District would have been absolved from liability under the act, as well as all the street railway carriers because all of the latter without exception extend and carry passengers outside the District limits by means of trolley lines into the adjoining States; and all telegraph and telephone lines, express carriers, vessels plying upon the Potomac, and would have left the act to apply only to the Metropolitan Coach line running from Pennsylvania avenue to U street amenable to the provisions of the act.

The evidence shows that the defendant was at the time of the injury complained of, the owner of, and operating a double track railway across the Highway Bridge, through Alexandria to Mount Vernon, by means of trolley lines; that it had its principal station at the corner of 12th street and Pennsylvania avenue; that it had stations for the reception and delivery of passengers along its route; that it had time tables, book of rules for the governance of its employees and all the essentials of a steam railroad, except only

that the motor power was by electric current. It is precisely the same character of railroad as those operating between Washington and Baltimore, Rockville and Chevy Chase, Maryland, and Bluemont and Great Falls, Virginia, denominated as trolley lines of railway.

> "When these street railroads carry passengers across a State line they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887. Street railroads transport passengers from street to street, from ward to ward, from city to suburbs, but the commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight 'between States,' 'between States and Territories,' 'between the United States and foreign countries."
>
> Omaha Street Ry. vs. Int. Comm. Comm., 230 U. S., 336.

The decision in the above case explicitly draws the line of distinction between "a company chartered as a street railroad doing a street railroad business and hauling no freight" and that of the railroad owned and operated by the defendant, as well as showing that by the terms of the Act of 1887 it could not in the nature of things apply to street railways of the class owned by the Omaha Company in that case.

By the terms of the Act of 1906, and the construction placed upon it by this court, and the other courts where it has been brought in question, it is made applicable to every common carrier engaged in business in the District without regard to the character or kind of business and embraced the defendant company, and rendered it liable to any of its employees for negligence of a fellow servant causing injury, and the trial court did not err in refusing to instruct the jury to render a verdict for the defendant.

ANSWER TO PLAINTIFF IN ERROR'S THIRD PROPOSITION OF ARGUMENT.

The defendant's third proposition of argument is to be found on page 46 of their brief. It is there claimed that the court held, by refusing the defendant's 10th prayer (Tr., 57), that the doctrine of assumed risks was abolished by the statute, thereby practically imposing upon the carrier the liability of an insurer. That prayer related only to the assumption of the "intrinsic risks of such employment," and made such risks to include every risk other than (1) negligence of fellow servants, (2) failure of master to exercise care in furnishing a safe place to work, (3) employing competent servants.

This instruction was clearly erroneous because it failed to make intrinsic risks to apply to many other acts of negligence of the master not included in the enumeration, although enumerated in the statute, such as "defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, road bed, ways or works."

Again, the evidence showed without contradiction that the plaintiff below was not injured by any of the ordinary risks assumed by him as incident to the service. No more so than if the draw had been open and the train had been run by the motorman into the Potomac River, in which case it is conceded by defendant's brief, at p. 83, that the plaintiff below would have been entitled to recover for injuries which he might have thereby received.

The plaintiff in error's brief says:—

> "It might be entirely true and doubtless was true that the rule was adopted for the protection of the trolleyman *from* the danger of being propelled into an open draw, and if this train had been propelled into an open draw owing to the negligent failure of the motorman to observe the stop sign, then such negligence would have been the proximate cause of the injury and

> the plaintiff would have been entitled to a recovery, provided the Fellow Servants' Law is held applicable to his cause. * * *"

If the risk of running into an open draw was not assumed because that could only have been the act of the Motorman Groves, how can it be said that Downey assumed the risk of the accident brought about by Groves in running the train in the manner he did upon and over the draw? Whilst it has been said that assumed risk sometimes shades into negligence, yet in this case this accident happened through positive and unequivocal negligence, either (1) negligence of the plaintiff, or (2) the negligence of the fellow servant motorman, or (3) the negligence of the master, or (4) the concurrent and combined negligence of the master and the fellow servant of the plaintiff. This prayer was also erroneous by including at the latter portion of it, and blending a submission to the jury, that if they "believed from the evidence that the defendant was injured by reason of such risks or *in some unknown or unforeseen way*, then the verdict must be for the defendant." A prayer so framed, if it had been granted, could only have resulted in misleading and confusing the jury and in an invitation to wander from the facts, and to speculate and guess as to some cause for the accident undisclosed by the testimony, *unknown* or *unforeseen*.

Nor can defendant's complaint be sustained that the trial court "imposed upon the carrier the liability of an insurer" (defendant's brief, p. 46), because the court refused its said prayer, when by reference to the court's charge (Tr., 60) after stating generally the measure of the duty of the employer and its agents to exercise ordinary care, the charge then proceeds as follows:

> "Now in connection with that I will also state the law to be this: That a railway company is in no sense

> an insurer of the safety of its employees, nor is it responsible for any injury to its employees, except where it is proved to the satisfaction of the jury that the injury was the usual and the probable result of the negligent act of the railway company alleged in the declaration, and its failure to use due care in discharging some duty which it owed to its employees. Its whole duty is to use due and reasonable care and when this duty is performed the company is not responsible for any results, however painful or calamatous they may be."

Thus the court, instead of granting an improper prayer, carefully and correctly charged and warned the jury that the defendant was in no sense an insurer of the safety of its employees.

All of the evidence, both for the plaintiff and defendant, proved that the trolley wheel would pass over the disconnected wire without being thrown off, only when the train was proceeding no faster than six miles an hour when passing on the draw. There was no assumption of risk at the place of the accident, because there was ordinarily no danger to the plaintiff unless produced by the speed with which the car was driven, through the negligence of the motorman, and as to that negligence there was no assumption of risk.

> Texas & Pacific Ry. Co. vs. Behymer, 189 U. S., 468, 470.

An employee does not assume the risk of the engineer's act in running the train over bad places in the track at a rate of speed which is dangerous considering the condition of the track, and for such negligence the company is liable. It was proper for the jury to pass on the question as to whether the rate of speed was dangerous or not.

> Meloy vs. The Chicago & N. W. Ry. Co., 77 Iowa, 746, 747.
>
> McGovern vs. Phila. & Reading R. R., 235.
>
> U. S. Rep. No. 4, pp. 389, 400, 401.

ANSWER TO PLAINTIFF IN ERROR'S FOURTH PROPOSITION OF ARGUMENT.

At page 58 of defendant's brief complaint is made of the charge of the court (Tr., 64) in qualifying the plaintiff's seventh prayer by calling to the attention of the jury its duty to diminish the damages that might be awarded under the statute in harmony with the directions contained in the plaintiff's sixth prayer, granted by the court (Tr., 52, bottom 53). The court told the jury that in assessing the damages they should consider the previous instruction (meaning plaintiff's sixth prayer), granted by the court, and in what it further said was merely by way of reminder as to and pointing out the instruction to which the court referred in using the phrase, "the previous instruction I have given you"; but did not undertake to repeat that instruction in *totidem verbis*. The qualification as to damages was entirely to the advantage of the defendant, whose interests were in the mind of the court, and was being safeguarded and protected from an award of more damages than would have been found had the plaintiff's sixth prayer as to the comparison of negligence and apportionment of damages to be based upon it not been brought to the jury's attention. In effect the court told the jury that it must consider the plaintiff's seventh prayer in conjunction with the plaintiff's sixth prayer, as will clearly appear from a perusal of Tr. 53 and 64.

The true rule as to defendant's liability and the limitations thereon having been stated to the jury in the plaintiff's 6th prayer, and the defendant's exception being directed to a single detached remark, and no request having been made to the court to restate the rule of apportionment embraced in the plaintiff's 6th prayer, nor attention called to the alleged defective portion of the charge, and it being manifest that

the jury could not have been misled thereby, the judgment will not be reversed even though the court failed to state the proper limitation of defendant's liability in such detached remark, the jury having previously been informed of such limitation as they were by said 6th prayer.

Choctaw, etc., Ry. Co. vs. Tennessee, 191 U. S., 326.

ANSWER TO PLAINTIFF IN ERROR'S FIFTH PROPOSITION OF ARGUMENT.

At p. 59 of its brief the plaintiff in error assigns for error the refusal of the court to grant its 8th instruction.

It relies on alleged negligence of the plaintiff to defeat the action. It contends that, conceding the defendant's negligence in not stopping the train at the stop sign before passing onto the draw and running its train at an unlawful rate of speed on the bridge, that if the plaintiff knew the facts or either of them, or by the exercise of due care should have known them or either of them, and could with the means in his power have avoided the injury by pulling down the trolley or by giving the motorman a signal to stop or otherwise, *it was his duty to do so* without waiting for a stop or signal from the motorman, and his failure to do so was gross negligence, and if injured thereby his negligence was the proximate cause.

There is no evidence in the case of any negligence whatever of the plaintiff. The rules of the company offered in evidence by the plaintiff prescribed his duties and the relative duties of the trolleyman and conductor.

> "Rule 69. The motor bell must be rung before starting a train."
>
> "Rule 118. Conductors and motormen will be held equally responsible for the violation of any of the rules governing the safety of their trains (in italics)

and they must take every precaution for the protection of their train even if not provided for by the rules."

"Rule 317. When with the motor, the trolleyman must obey orders of the motorman respecting the proper performance of his duties. * * * He must not run a motor in the absence of the motorman unless in some emergency he is directed to do so by the conductor or some one in authority" (Tr., 34, 35).

Harvey K. Shaner, conductor:

"That the motorman regulated the speed of the train; that the motorman operates the brakes; that there are brakes for the trolleyman to operate, but only when he gets the signal from the motorman; that the trolleyman had nothing to do with the controlling and operation of the car with respect to when it shall stop or when in motion; that the motorman is responsible for schedule time and speed" (Tr., 28). "That if the trolleyman undertook to interfere with the speed of a train by lowering the trolley, it would have been witness' duty to report him; that he had no business to do that unless he had a signal to do it (Tr., 28).

William C. Litchford:

"He (the trolleyman) has nothing to do with the speed of the car" (Tr., 25).

The plaintiff:

"By pulling the trolley down he could cut off the power, but he was not instructed to do that; it would cut off the light" (Tr., 33).

Thus, by the defendant's rules, supplemented by the uncontradicted testimony of the witnesses, it clearly appears that no power was conferred nor duty was imposed upon trolleyman Downey to change, stop, modify or regulate the speed of the trains, and any such attempt on his part

would have been a culpable breach of duty under the rules, and that he was at the time of his injury under and subject to the direct orders of the motorman who, by the company's laws, not only governed and controlled the trolleymen, but also governed and controlled the train in its movements and speed.

The defendant's claim is that the plaintiff was negligent if he knew or ought to have known that the motorman failed to comply with the defendant's regulation to stop its car at the stop sign before running onto the draw, and plaintiff with such knowledge failed to avoid the injury, such failure was such gross negligence as to have been the proximate cause of the injury, or, in other words, the plaintiff brought the injury upon himself and therefore cannot recover. This contention as to the plaintiff's knowledge is refuted by the undisputed evidence.

Joseph G. Harris:

> "The trolleyman's position is between the two cars, on either the rear platform of the motor car or the front platform of the trailer or rear car" (Tr., 11).

Joseph W. Dodd:

> "Trolleyman cannot see the stop sign which is *right in the middle of the track hanging from the roof of the bridge*—when standing in his position between the cars, unless the motorman stops right up to it; that *the roof* (of the car) *is over where the trolleyman stands on the back platform of the motor car*" (Tr., 18).

William C. Litchford:

> "Trolleyman standing in middle of rear platform on motor car or middle of front platform of the trailer could not see the stop sign *because the car is all in front*

of him and the platform (roof) *overhead.* Running 20 miles an hour at night you could not tell where you were on the bridge, as the spans on the bridge would come together fast like they were made together. That running 20 miles an hour the trolleyman would have no notice that he was about to reach the draw where the rails disconnect; * * * that the gates were right at the end of the bridge next to the draw; that when you reached these gates if a train was running 20 miles an hour you would not have an opportunity to pull down your trolley before it got on the draw, nor from the time the front wheels of the motor went upon the draw to the time the trolley reached this open space. * * * that he (trolleyman) is not supposed to look out on either side of the car except to see for the safety of passengers" (Tr., pp. 24, 25).

Edward A. Downey:

"The spans were going past him very fast; it was drizzling snow-like, and the snow would come down and hit you in the face like mist or rain; * * * that the train was going so fast and the spans passed him so quick he did not have any idea they were approaching the draw; that he was standing on the rear end of the motor car facing the motor car on the platform which is about 4 feet wide; that the only way he could tell the location of the car and himself with respect to the draw was by the car stopping; that standing in the position that he was, he could only see along the sides of the bridge at an angle from the car (indicating); that in crossing the bridge he looked from one side to the other but could not tell where he was" (Tr., 30-31). "That the wind was blowing very hard at the time of the accident" (Tr., 32).

Charles Mumford, defendant's witness:

"That trolleyman could not see stop sign unless he looked around the side of the car. * * * that snow or fog would make a difference as to ability of one to see spans" (Tr., 39).

It was clearly in proof before the jury that if the plaintiff, trolleyman, would have been justified in violation of his duty in assuming control of the train in place of the motorman by cutting off the current in the event of a known peril, which is denied, under the facts and circumstances shown in evidence, he was so situated at the time of the accident that he did not and could not know when the stop sign was passed, or the draw would be reached, or that the motorman would continue to run the train upon the draw at such rate of speed as to prevent the performance of the plaintiff's duty by the timely displacement of the trolley before the casualty occurred, and the evidence fully exonerated the plaintiff from any negligence, either remote or proximate, contributing to such a result.

The defendant's contention, in effect, is that the negligence of Groves, the motorman, in operating the train is transmissible to the plaintiff and is imputable to him because he did not foresee, or have foreknowledge of, what Groves was about to do, or did, in running the train past the stop sign and upon the draw at such hazardous speed as to imperil the safety of the train and its occupants, and that because the plaintiff did not intercept or thwart the motorman's negligence that negligence shifted to and fused into the plaintiff so as to constitute him the proximate cause of the accident. A similar contention was made in Illinois, but the court refuted and rejected it, and, after citing numerous cases, declared the law to be that

> "In order that the negligence of one person may be properly imputed to another they must stand in such relation of privity that the maxim *qui facit per alium facit per se* directly applies."
>
> Nonn vs. Chicago City Ry. Co., 232 Ill., 378, S. C.; 122 Am. St. Rep., 114.

But, in addition, it was shown in evidence that the defendant had provided some sort of mechanical apparatus or device at the point of wire disconnection at the ends of the draw on the bridge for the purpose of guiding the trolley wheel across the interval between the ends of the wires which was of about four inches in space.

Joseph G. Harris:

> "There is a brass plate at the point of disconnection for the purpose of guiding the trolley wheel over this small disconnection in the trolley wire which is three or four inches long" (Tr., 12).

Joseph W. Dodd:

> "It is a kind of piece of iron run from the edge of the draw where it opens, to the trolley wire; the reason they put it up there, they thought the trolley would ride over it; if they run real slow, as I say, it will ride over it" (Tr., 18).

The substance of the said eighth prayer of the defendant refused by the court was subsequently embraced in the defendant's twelfth prayer granted by the court (Tr., 57), in which the court instructed the jury "that there is but one view of the evidence in this case in which a verdict for the plaintiff can be returned and that is that the following facts are shown affirmatively by a preponderance of the evidence to have existed at the time of the accident"; and in the alphabetical enumeration at "C" of the facts necessary to be shown by the plaintiff the court told the jury that one of the propositions set forth is:

> "That while the trolleyman relying thereon (the rule) the defendant's motorman carelessly and recklessly ran his car onto said draw at a dangerous rate

> of speed before the plaintiff had notice of the fact or in the exercise of due care could have had notice of the fact that he was about to cross said draw."

Under this prayer the court went further upon the proposition of the plaintiff's negligence barring his recovery than in the defendant's eighth prayer, for the court told the jury at the conclusion of the twelfth prayer that

> "the burden of proving each element in the twelfth prayer was upon the plaintiff. If the plaintiff fails to establish either of these essential facts by a preponderance of the evidence the verdict must be for the defendant" (Tr., 57).

Thus the right of recovery was absolutely denied the plaintiff if he had notice, or in the exercise due care could have had notice that he was about to cross the draw, by *those facts alone*, unmixed with any other considerations of the plaintiff's negligence, which would have been necessary to have been found by the jury from the evidence under the defendant's eighth prayer refused.

The defendant undertook to prove that the trolley wheel was *liable* to fly off anywhere; so, too, the train was *liable* to derailment anywhere; a mere possibility of an occurrence, which is no proof that the act occurred. But the unequivocal physical fact established by the uncontradicted evidence is that at this particular place, because of the disunited wire, the *wheel would surely jump off* and probably cause damage and injury to the train or its occupants if the speed was more than six miles an hour. The means adopted by the defendant to remedy the condition by the mechanical contrivance was proven to be totally inadequate for that purpose, and that fact obligated the company's motorman to proceed slowly onto the "draw" lest the trolleyman might not

have time and opportunity to disengage the wheel from the wire and avoid what otherwise would be an inevitable accident.

But the defendant company by its own negligence, as distinguished from that of its said motorman, was responsible to the plaintiff for the injuries it inflicted upon him as shown by the testimony it introduced in its defense at the trial.

In order to escape liability for negligence of its motorman in running the train at the velocity of 25 or 30 miles an hour over the draw, as a matter of defense defendant introduced a number of witnesses to prove that the company had provided no rule for regulating or limiting the speed on the bridge, and hence argue that the motorman was at liberty, without negligence on his part, to run the cars across the bridge at any rate of speed, however fast or dangerous, agreeably to his own fancy or inclinations:

Charles Gill (Tr., 37); Charles Mumford (Tr., 37); Fenton Fitzhugh (Tr., 38); Wallace L. Groves (Tr., 41); John Duterman (Tr., 45); Eppa McDonald (Tr., 46); William C. Crockett (Tr., 46); Joseph Colvin, superintendent (Tr., 50).

And in further support of their contention they offered in evidence a train order of February 4, 1908:

> "Notice to trainmen: About 5 inches broken off rail three spans from the north end of the draw on the southbound track. Trains will reduce speed to about six miles per hour in crossing over this place" (Tr., 44).

To exculpate itself from the consequences of fast running of the train by the motorman, the defendant inculpated itself by proving that it failed in its duty to its employees to adopt safe and proper rules for the running of the trains on the bridge and over the draw.

"It has been held in many States that the master owes the further duty (to its servants) of adopting and promulgating safe and proper rules for the conduct of its business, including the government of the machinery and the running of trains on the railroad track. If the master be neglectful in any of these matters, it is a neglect of duty which he personally owes to his employees, and if the employee suffer damage on account thereof the master is liable."

North. Pac. R. R. vs. Peterson, 162 U. S., 353.

"It is the duty of a railroad company to promulgate *adequate rules and regulations* for the safety of employees engaged in the dangerous duty of operating trains."

Santa Fe Pac. R. R. vs. Holmes, 202 U. S., 438.

The negligence of the defendant company in not providing a safe rule for the observance of its motorman limiting speed in passing its trains on and over the draw where there was a vacancy or space of about four inches between the ends of the trolley wire is in glaring contrast with its prudence in providing a rule reducing the speed to six miles an hour over a space of about five inches of the broken-off end of the rail.

Thus on its own showing the defendant proved its liability to the plaintiff by the rules and principles of the common law, without regard to the provision of the Employers' Liability Act of June 11, 1906, in force at the time of the injury occurring on the night of November 29, 1907.

ANSWER TO PLAINTIFF IN ERROR'S SIXTH PROPOSITION OF ARGUMENT.

The sixth proposition of argument of the plaintiff in error (brief, p. 62) discusses its 1st assignment of error to the action of the court in overruling the defendant's objec-

tion to admission in evidence of the rule of the defendant in connection with the "stop sign" (Tr., p. 12). Plaintiff in error in its brief (p. 62) says that the "apparent" purpose of this regulation was "not to safeguard the plaintiff or any other employee of the company against any danger which might result to them from the liability of the trolley to leave the wire at the draw."

As refuting this contention *Joseph G. Harris* testified:

> "The wire was disconnected at each end of the draw. The disconnection is three or four inches long" (Tr., 12). "The motorman should stop before reaching the draw *and not start again until he got a bell from the trolleyman*" (Tr., 12). "After stopping at the stop sign motorman would get a bell from the trolleyman to proceed *and would slow up when he got to the draw to give the trolleyman opportunity to pull down the trolley*" (Tr., 15).

Joseph W. Dodd:

> "Train dispatcher would give new man an order to 'break in.' New man would go with the order to the conductor, who would turn him over to the trolleyman. He (witness) had him (Downey) for a couple of days breaking him in as trolleyman" (Tr., 16-17).
>
> "Q. What did you tell him about the stop sign?
>
> "A. Why, I told him the 'stop' sign there is for the motorman to stop on account of the draw, and wait for a signal to go ahead.
>
> "Q. When he stops does he have to have a signal to go ahead?
>
> "A. Yes, sir.
>
> "Q. Who gives that?
>
> "A. *The trolleyman.*
>
> "Q. Is that a rule of the company?
>
> "A. Yes, sir.
>
> "Q. What, if any, instructions did you give Mr. Downey when you broke him in, in regard to the stop

sign on the draw at the bridge and the trolley arrangement at that place?

"A. I always instruct the trolleymen I break in when they get to the stop sign to get ready to pull the trolley down when they hit the draw.

"You can tell when you hit the draw by the red gate there. The gates are at the draw 'itself.' So when you hit the gate you also hit the draw.

"Q. By hitting the gates you mean you are at the draw?

"A. Yes, sir.

"Q. The gates are on the draw?

"A. Right on the draw where it opened.

"Q. So when you pass the point where the gates are, at the same time you pass on the draw, do you not?

"A. Yes; when you get even with the gates you are right even with the draw" (Tr., 17).

That he instructed Mr. Downey

"that after the motorman comes to the stop at the stop sign he always told him (Downey) to get himself in position so he could pull the trolley down as he entered the draw" (Tr., 17).

Edward A. Downey, plaintiff:

"Q. What instructions were given you as to the crossing of that draw by those who broke you in?

"A. I was told that the train comes to a full stop at the south end or north end of the draw going north or going south *at the stop sign, the purpose of stopping there was to prepare you to pull down your trolley when you came to this parted rail.* I have always pulled it down when I crossed that. I never had it to pass over. I always got myself in position to do my duty" (Tr., 32). Had been instructed by the trolleyman who broke him in that cars must proceed very slowly when entering upon the draw" (Tr., 29). "That in going on or off the draw the train is going very slow" (Tr., 33-34).

John T. Curtain:

"Q. What was the object of the stop sign that was there?

"A. The man who broke me in always told me *to stop there to signify to pull down the trolley, to watch for the draw and pull down the trolley*" (Tr., 26).

Harvey K. Shaner, conductor:

"That the purpose of the stop sign is for the safety of the train in general; by this witness testified that he meant the passengers, the company's property, employees, and all; that he always considered the stop sign a *warning to trolleymen*" (Tr., 30).

Charles Mumford, defendant's witness:

"That it (trolley) is more apt to fly off when the car is going fast than when it is going slow" (Tr., 38).

Frank M. Fitzhugh, defendant's witness:

"Running at a low rate of speed it (trolley) will ride (the wire); that is, *if both spans are together straight across*" (Tr., 40).

E. Forrest Burrell:

"That on this bridge they (trains) usually run about 10 miles an hour and then slow down gradually until they go to this stop sign. * * * that when they cross the draw they go at a very slow speed" (Tr., 16).

Joseph G. Harris:

"Unless you are going at a pretty good speed the trolley will not jump off at the draw" (Tr., 14).

Joseph W. Dodd:

> "Well, if running 8 or 10 miles an hour it (trolley) will not ride over it" (Tr., 18).

See also Court of Appeals discussion of this subject (Tr., p. 70).

ANSWER TO PLAINTIFF IN ERROR'S SEVENTH PROPOSITION OF ARGUMENT.

The seventh proposition of the plaintiff in error to be found in its brief (p. 65), relates to its 2d assignment of error as to the admission of testimony concerning the reputation of the motorman Groves for recklessness in the discharge of his duties.

As to this assignment little need be said. The court admitted the evidence tentatively as shown at Tr., 14 during the examination-in-chief of the witness Joseph G. Harris (Tr., 13, 14). Upon objection having been made, the court admitted it, saying:

> "The Court: I think he can state what his (Groves') reputation was for carelessness. * * * It is only admissible if the knowledge is brought home to the company."

Upon this subject the Court of Appeals, speaking from the record, Tr., 14, 15, 22, 23, 25, 26, 37, 41, 45, aptly said:

> "(5) There was evidence tending to show that the motorman upon the train in question was reputed to be

a reckless or fast runner, and that this had been brought to the knowledge of the company. The admission of this evidence is assigned as error. In the second count of the declaration it is averred that this motorman had been in the defendant's employ for a long time, and that he was 'negligent, unskilful, unfit, incompetent and reckless as a motorman of cars, of which facts the defendant had notice and knowledge, and by the use of ordinary diligence' would have had such knowledge; and that notwithstanding such knowledge or means of knowledge on the part of the defendant, it retained him in its employ and entrusted to him the control of its cars. It is apparent, therefore, that had the court, as requested by the defendant, ruled that the Employers' Liability Act was not applicable, evidence of the incompetency of said motorman, if brought home to the company, would have been very material. Hence, it was clearly admissible when offered. As no motion was subsequently made to strike out the evidence and no charge requested concerning it, its pertinency at the time the case was submitted to the jury, was not passed upon by the trial court, and there is therefore no foundation here for this assignment of error. Moreover, it is apparent from the prayers offered by the respective parties and the charge of the trial court, that this evidence was lost sight of when the liability act was held applicable. The question then was not whether the motorman had therefore been negligent, but whether he was negligent at the time of the accident."

The admission of incompetent or irrelevant evidence is no sufficient reason for reversing a judgment where it is apparent that it cannot have affected the verdict or the finding injuriously to the plaintiff in error.

Homes vs. Goldsmith, 147 U. S., 150-164.
Mining Co. vs. Taylor, 100 U. S., 37-42.
D. C. vs. Woodbury, 136 U. S., 450-462.
Cunningham vs. Springer, 204 U. S., 647-653.

This principle taken in connection with the 12th instruction granted on behalf of the defendant (Tr., 57), by which the plaintiff's right to recover was narrowed down to and made contingent upon establishing each and all of seven different propositions of fact by a preponderance of the evidence and in most positive and drastic terms excluding every other hypothesis of fact, including the reputation of Groves for negligence, is a sufficient answer to this contention of the defendant without the further consideration shown by the record that the subject of the motorman's reputation for negligence was entirely ignored as a factor in the trial, and so much so that no motion was made by the defendant to strike out the evidence introduced upon that subject, nor was it in anyway called to the attention of the court.

ANSWER TO PLAINTIFF IN ERROR'S EIGHTH PROPOSITION OF ARGUMENT.

This proposition of the plaintiff in error (its brief, p. 71), has already been argued in the consideration of the applicability of the Act of 1906 to this case.

ANSWER TO THE NINTH PROPOSITION OF ARGUMENT OF PLAINTIFF IN ERROR.

The ninth proposition of argument of defendant's brief (page 71) contains an attack upon plaintiff's second prayer granted by the court with modifications (Tr., 71). The complaint is, first, that there is no evidence in the record on which to rest the prayer, and second, that it assumes as a matter of fact that there was an inability on the part of the plaintiff to pull down the trolley pole by assumed rapid speed. The evidence upon which that prayer was based has already been incorporated in this brief and if this court should go

into the evidence it will find ample basis for the prayer. As to the alleged assumption of the trial court, this court is referred to the charge of the Judge at Tr., 61, in which all the matters of fact embraced in the prayer were submitted to the determination of the jury and wherein the court told the jury "you must consider that in connection with the question whether the speed of the car was the proximate cause of the trolley jumping the wire at the place where the wire was discontinued, at the south end of the draw. If it had nothing to do with the jumping of the trolley from the wire, then it is not the proximate cause of the accident." The court, by leaving the whole question of fact to the jury, committed no error and from a reading of the entire charge upon this point, it will be seen that the court did not assume the truth of any of the facts in the case.

The 6th, 7th and 8th assignments of error are to the action of the court in granting plaintiff's 5th, 6th and 7th prayers. The defendant states in its brief that these prayers are based upon the Employers' Liability Act under which this suit was brought and which question has already been fully argued on both sides. Of course, if the act was invalid as to the defendant and should be so declared by this court, the motion to order a verdict should have been granted and the plaintiff's prayers based upon the validity of said act would as a natural sequence be overthrown and therefore further discussion would be superfluous. The plaintiff's prayers, except that as to the measure of damages, were copied from the record of the charge of the court in El Paso, etc., Ry. Co. vs. Gutierrez, 215 U. S., 87, which passed the scrutiny and met the approbation of this tribunal.

The fifth prayer is in the exact language of the last paragraph of the second section of the act, which provides that "all questions of negligence and contributory negligence shall be for the jury." The court was obliged to so instruct the jury not only because of the statutory mandate but as a

corollary of its charge as to comparison of negligence between the employees and the measure of the damage dependent upon such comparison. Nor is it apparent how the instructions taken together could have mislead the jury into consideration of acts of negligence *dehors* the declaration.

The defendant's 12th prayer granted as modified prohibited the jury from finding a verdict for the plaintiff unless all of the seven different propositions of fact embraced in that prayer were found by the jury to be established by the evidence in the case.

ANSWER TO THE TENTH PROPOSITION OF THE PLAINTIFF IN ERROR.

This relates to the 9th assignment of error to the action of the court in refusing the 8th prayer of the defendant. In the consideration of the 5th proposition of argument, the plaintiff has fully discussed this prayer and refers to the argument there made as sustaining the action of the court. The contentions of the defendant upon this subject has no application to the case before this court.

As to the 10th assignment of error to the action of the trial court in refusing the 9th prayer requested by the defendant, no showing whatever is made of the applicability of that prayer to the case, the defendant contenting itself with the assertion that the prayer was submitted to the court on the defendant's theory. Without going into any discussion of that prayer, it is sufficient to say that its only effect could have been to have confounded and misled the jury. Besides, the prayer was founded upon the non-liability of the master for the negligence of the fellow servant at common law and therefore was properly refused by the court.

ANSWER TO THE TWELFTH PROPOSITION OF ARGUMENT OF THE PLAINTIFF IN ERROR.

The defendant claims that it was error in court not to have granted the 13th instruction asked by it. The refusal to grant the 13th prayer cannot be assigned for error because the court had already granted the 11th prayer requested by the defendant (Tr., 57 and 63), which prayer embraced, among others, the same proposition advanced in defendant's prayer No. 13 (Tr., 58). Furthermore, a mere perusal of the prayer shows that it was faulty in other respects and properly rejected by the court.

ANSWER TO THE THIRTEENTH PROPOSITION OF ARGUMENT OF PLAINTIFF IN ERROR.

The thirteenth proposition of argument of the plaintiff in error complains of the refusal of the court to grant the fifteenth prayer asked by the defendant. This prayer did not submit any question of negligence to the jury and merely told the jury that if the plaintiff while holding the trolley rope in his hand permitted it to escape, their verdict must be for the defendant. It contained an isolated proposition and was not adapted to the facts in the case and entirely eliminated from the consideration of the jury the Employers' Liability Act, and was founded upon the exemption of the master from liability for the negligence of the plaintiff by the fellow-servant in the teeth of the act of 1906.

ANSWER TO THE FOURTEENTH PROPOSITION OF ARGUMENT OF THE PLAINTIFF IN ERROR

The answer to this proposition of argument is that there is no error assigned to that portion of the charge embraced

in what the defendant calls the fifteenth assignment of error as by reference to the assignments of error at Tr. pages 65 and 66 will disclose. The last assignment of error is on page 66, being the twelfth assignment which relates to the charge of the court and in that assignment no mention whatever is made of that portion of the charge assigned for error on page 81 of the defendant's brief. In addition, that portion of the charge assigned for error was explanatory of the defendant's sixth prayer, Tr. 54, granted by the court and that portion of the charge complained of did not have the effect of changing the prayer which was already granted upon that subject, the meaning of which was plain and obvious and the exception to the charge connected with the instruction is nothing more than a close criticism of words which could not have had the effect of misleading the jury.

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